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Supreme Court of the United States

OCTOBER TERM, 1963

No. 199

WINSTON MASSIAH, PETITIONER

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 186—September Term, 1961.

Argued February 8, 1962

* * * *

Docket No. 27125

UNITED STATES OF AMERICA, APPELLEE

v.

WINSTON MASSIAH, MITCHELL ANFIELD, LEONARD ROYAL AIKEN, and ICKY THORN, APPELLANTS

Before:

LUMBARD, *Chief Judge*,
WATERMAN and HAYS, *Circuit Judges*.

Appeals from convictions for conspiracy to import drugs into the United States in violation of 21 U. S. C. §§ 173 and 174 after trial in the Southern District of New York before J. Skelly Wright, *J.*, sitting by designation, and a jury. Massiah also appeals from conviction for related offenses in violation of 21 U. S. C. § 184(a), §§ 173 and 174, and 26 U. S. C. §§ 4701, 4703, 4704(a), 4771(a), and 7237(a).

Reversed as to conspiracy convictions; affirmed as to Massiah's substantive convictions.

[fol. 2] SHELDON H. ELSEN, Assistant United States Attorney, Southern District of New York, New York, N. Y. (Robert M. Morgenthau, United States Attorney, James G. Starkey, David Klingsberg, Peter K. Leisure and Arnold N. Enker, Assistant United States Attorneys, on the brief), *for appellee.*

ROBERT J. CARLUCCIO, New York, N. Y., *for Winston Massiah, appellant.*

LEWIS A. STERN, New York, N. Y., *for Mitchell Anfield, appellant.*

CARSON DEWITT BAKER, New York, N. Y., *for Leonard Royal Aiken, appellant.*

EDWARD CHERNEY, New York, N. Y., *for Leonard Royal Aiken, appellant.*

ICKY THORN, *appellant pro se.*

OPINION—July 27, 1962

LUMBARD, *Chief Judge:*

Winston Massiah, Mitchell Anfield, Leonard Royal Aiken and Icky Thorn appeal from their convictions, after an eleven-day trial before a jury in the District Court for the Southern District of New York, for conspiracy to import cocaine into the United States in violation of 21 U. S. C. §§ 173 and 174. Massiah also appeals from his conviction on three related charges: unlawful possession of cocaine on May 6, 1958 on the S.S. Santa Maria, a United States vessel engaged on a foreign voyage, in violation of 21 U. S. C. § 184(a), unlawful concealment of the same cocaine in violation of 21 U. S. C. §§ 173 and 174, and possession, on the same occasion, of cocaine not having come [fol. 3] from an original stamped package, in violation of 26 U. S. C. §§ 4701, 4703, 4704(a), 4771(a) and 7237 (a).[1]

[1] Massiah was sentenced to nine years' imprisonment on each of the counts against him, the sentences to run concurrently. Anfield and Thorn were each sentenced to nine years' imprisonment on the conspiracy count, and Aiken, a second offender, to thirteen years' imprisonment.

These appeals present two major questions. The first is whether it was proper to receive in evidence testimony by a federal officer concerning conversations of Massiah and Anfield which each held separately with a co-defendant, Jesse Colson, in Colson's automobile. With Colson's cooperation, a portable transmitter had been secreted in the automobile. Both Massiah and Anfield claim that it was unlawful thus to eavesdrop on the conversations, and Massiah further claims that the procedure was illegal because he was already indicted (under an indictment returned prior to that on which he was tried, but which was concerned with the same subject matter) and had retained counsel, and therefore could not legally be approached by persons acting on behalf of the government in the absence of his counsel. The second major question is whether the trial judge inadequately charged concerning the necessity, under 21 U. S. C. §§ 173 and 174, that the conspirators had had knowledge of illegal importation.

Judge Waterman and I are in agreement that the eavesdrop evidence was admissible against both Massiah and Anfield, while Judge Hays considers it inadmissible against Massiah. Thus we affirm Massiah's conviction on the substantive counts, with Judge Hays dissenting. Since Judge Waterman agrees with Judge Hays' view, stated in his separate opinion, that the change on the conspiracy counts was inadequate, the convictions of Anfield, Aiken and Thorn and Massiah's conspiracy conviction are reversed and remanded for a new trial. I dissent from this [fol. 4] disposition of the conspiracy counts for the reasons stated in part II of this opinion and vote to affirm all the convictions.

We briefly summarize the evidence which was given by several participants in the conspiracy and those who dealt with the conspirators.

Massiah, Colson and Anfield were seamen on ships of the Grace Line, and commencing in 1956 they obtained cocaine from one Rene Huasaff in Valparaiso, Chile, took it aboard a Grace Line ship to the United States and caused it to be brought ashore by longshoremen when the ships had docked in the Hudson River at New York. Aiken and Thorn purchased large quantities of the cocaine

from the importer-defendants and distributed it in New York. There was evidence of at least twelve importations and seven purchases between 1956 and 1959.

The importer-defendants would often arrange to have a longshoreman pick up the cocaine on the vessel, take it ashore, and later meet them at an appointed rendezvous. Longshoreman James Barber testified that he had thus assisted Massiah and Colson after their arrival at New York on a number of occasions in 1956. Massiah's landlady, Elita Lloyd, testified that at about this time he had told her he was dealing in "coke." In 1958 Colson arranged to have a fellow seaman, Paul King, bring in "paint solids" which turned out to be cocaine. The appellant Thorn waited with Colson while King went back on the ship and returned with the "paint solids' which Colson then told him were narcotics.

In April 1958 customs agents were informed by Francisco Torres, a seaman who testified that he had bought cocaine from Jesse Colson on several occasions in 1957 and had been offered cocaine by Massiah, that a shipment of cocaine was due to arrive in New York on the S.S. Santa Maria on May 6 or 7. Customs agents boarded the ship when it docked and found in the aft peak five packages [fol. 5] containing over three and one-half pounds of cocaine. In Massiah's locker Agent Cozzi found tape exactly similar to that with which the packages were wrapped and a textile technologist testified that the torn end of the roll found in Massiah's locker matched the end of the tape with which the cocaine had been wrapped.

After Massiah's arrest, Colson telephoned Chile and arranged to have two Chilean women deliver cocaine to his home in the Bronx. There were two shipments and the bulk of both was sold to Aiken. Thorn also purchased some of this cocaine.

I. *Massiah's Conviction on the Substantive Counts—The Eavesdropping Incident*

Three weeks after his arrest on the Santa Maria, Massiah was indicted on May 28, 1958 and charged with violation of 21 U. S. C. § 184(a) for possessing three pounds eight ounces of cocaine on board a United States vessel.

On July 20, 1959, Massiah was again indicted together with Jesse Colson and one Rene Huasaff on a charge of conspiracy to violate the narcotic laws in violation of 21 U. S. C. §§ 174 and 184(a). Colson was thereupon arrested and a few days later he decided to cooperate with the government.

At 9:30 on the evening of November 19, 1959, Massiah got into Colson's Chrysler automobile which was then parked on West 146th Street between Seventh and Eighth Avenues. Prior to Massiah's meeting with Colson, Agent Murphy with Colson's consent had placed under the front seat of Colson's car a Schmidt portable transmitter which enabled him to hear the conversation through earphones while seated in another car.

Judge Wright, overruling numerous objections to the admission of the conversation, limited Agent Murphy's testimony to what Massiah said and excluded Colson's part [fol. 6] in the conversation. The judge also instructed the jury to consider the evidence only as to Massiah. Agent Murphy testified that in the course of the conversation Massiah told Colson that in late April 1958, while at the home of Rene Huasaff, in Valparaiso, Chile, he wrote a letter to New York and stated the amount of cocaine he was bringing in; he had the cocaine in a suitcase in his room aboard ship for twenty-two days and, when he noticed two days out of New York that the cocaine was evaporating he got the roll of tape and attempted to make it airtight to prevent further wastage. He said it was this tape which got him into trouble. Massiah also told Colson that upon arrival he met a longshoreman and motioned him through the passageway to show him where the cocaine was, but then noticed two men following him and told the longshoreman to come back later. Massiah also told Colson that he knew that information had been given the authorities by Frank Torres and also by a woman named May with whom he had had some dealings.

The indictment on which the appellants were tried was filed on March 3, 1961. In addition to Massiah, Colson and Huasaff, it named the appellants Anfield, Thorn and Aiken and seven others, and it listed fourteen co-conspirators. Obviously the Schmidt transmitter evidence was part

of a continuing investigation which bore sufficient fruit to result in the broader charges against many more defendants. As the trial judge permitted the jury to hear only limited parts of this evidence, we canot know in what other ways it may have assisted the government investigation.

Although Colson had pleaded guilty to several counts of the indictment, he did not testify against the other defendants at this trial.[2] The defendants called no witnesses [fol. 7] and none of them took the stand. There was ample evidence to support the convictions of all four appellants.

Massiah's counsel at trial made four objections to Agent Murphy's testimony, but of these he pressed only one on appeal, that use of the hidden device constituted unlawful eavesdropping. To support our rejection of this claim, we need do no more than refer to the discussion of a similar contention in our recent decision in *United States* v. *Kabot*, 295 F. 2d 848, 853-54 (1961), cert. denied, 369 U. S. 803 (1962).

On appeal Massiah raises a contention not made at trial, that since he was already under indictment at the time and represented by counsel it was a denial of his rights for any government representative to procure and listen to his conversation with Colson unless his lawyer was present. We do not agree.

The government had the duty to continue its investigation of the possible criminal activities of those suspected of crime even though they might be under charges or indictment at the time. Massiah acquired no immunity from the government's procuring and use of additional evidence merely by reason of having retained an attorney.[3] In-

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[2] At an earlier trial of these appellants, when Colson took the stand he told the court that he could not testify because his family had been threatened. Counsel for the defendants moved for a mistrial and on the following morning Judge Wright granted the motion for mistrial and commenced a retrial of the defendants on the next day before a new jury. Apparently the government chose not to call Colson as a witness because of his outburst at the first trial.

[3] The record does not show when counsel first appeared for Massiah. But as the government argues on the assumption that Massiah was represented by counsel on November 19, 1959, and that the government knew this, we treat this as being the fact.

deed the public interest would clearly seem to require the continuance of such investigations so that all involved may be prosecuted. Massiah was enlarged on bail. Whatever he said or did, if it constituted an admission of the pending charges, would be relevant and admissible in evidence [fol. 8] against him, provided of course the admission or action was voluntary. If a spontaneous conversation with Colson had been overheard by someone nearby there would be no question of its admissibility. It makes no difference that Colson was acting on the suggestion of Agent Murphy in inducing Massiah to enter the Chrysler and talk about the case. It is not disputed that Massiah entered the car of his own free choice and that he was equally free to speak about the case or to say nothing. It would needlessly hamper investigations of government agents if they were not able to make such contact with those under charges of crime as Agent Murphy made here through the co-defendant Colson. Many criminal cases are solved by such means.

We find no conflict between this view and the ethical precept that forbids direct communication between an attorney and another party represented by counsel, A. B. A. Canons of Ethics, Canon 9. Assuming without deciding that it would be improper for a prosecutor to interview a criminal defendant under indictment in the absence of his retained counsel, see Drinker, Professional Ethics 202 (1953), such a prohibition would not require that government investigatory agencies also refrain from any contact with a criminal defendant not in custody simply because he had retained counsel. To be sure, such a rule would prohibit an investigator's acting as the prosecuting attorney's alter ego, but there is no suggestion that Agent Murphy was so acting here. Moreover, the contact here was at still one further remove—with a co-defendant whose instructions from the investigator were apparently no more than to induce Massiah to talk. This was not a case where a defendant was in danger of being tricked by a lawyer's artfully contrived questions into giving his case away.

No case has been cited to us which supports the rule urged here by appellants. *Spano* v. *New York*, 360 U. S. [fol. 9] 315 (1959) is not in point as the Supreme Court

found that the defendant's confession had been produced by coercion. Spano was under indictment for murder and had been surrendered by his counsel who had instructed him to answer no questions. Despite this, an assistant district attorney and numerous detectives questioned him in prison for eight hours and obtained a confession. The Supreme Court found that Spano's will "was overborne by official pressure, fatigue and sympathy falsely aroused" and that the confession was coerced. Clearly Massiah's talk in Colson's car was not coerced in the slightest degree. There was no reason to believe that he was not speaking freely and without restraint of any kind.

Nor is *People* v. *DiBiasi*, 7 N. Y. 2d 544 (1960) in point as there too the defendant was in custody, and without his counsel, during his interrogation by an assistant district attorney after his indictment for a capital offense.

We see no reason why narcotics agents should not secure evidence by such deception as was played on Massiah in this case. Those who are engaged in the difficult and dangerous business of investigating illegal dealings in narcotics should not be deprived of any reasonable means of securing evidence. The Narcotic Control Act of 1956 is striking evidence of Congressional concern over this problem. That Act, 70 Stat. 567, 18 U. S. C. § 1405, 26 U. S. C. § 7607, gave increased powers of search and arrest to government agents investigating violations of the customs and narcotics laws; it gave prosecutors the means of giving immunity and compelling testimony, and it greatly increased the minimum and maximum punishments for violations of these laws. See also House Report No. 2388 and Conference Report No. 2546 accompanying H. R. 11619, 84th Cong. Second Session (1956), 1956 U. S. Code Cong. & Admin. News, 3274-3322.

[fol. 10] Massiah makes other claims of error which require but brief reference, if any.

He complains of the search of the Santa Maria and his locker by the customs agents. 19 U. S. C. §§ 482 and 1581 have long authorized such searches of incoming vessels. We said in *Landau* v. *United States Attorney*, 82 F. 2d 285, 286 (1936): "The search which customs agents are authorized to conduct upon entry is of the broadest pos-

sible character and any evidence received might be used."

The trial judge's action in admitting into evidence on the substantive counts against Massiah the tape found in his locker and the tape wrapped around the cocaine package was entirely proper. It had already been received on the conspiracy count. There is no showing that this ruling at the end of the government's case in any way prejudiced Massiah and no such claim was ever made. After this the defendants immediately rested without calling any witnesses.

II. *The Conspiracy Counts*

Although numerous errors are alleged with respect to the conspiracy convictions, the only important point is the claim that Judge Wright did not make it clear in his charge that it was necessary for the jury to find that the conspirators either had knowledge that the drugs in question had been illegally imported or else had such "possession" of the drugs as would under the terms of § 174 raise the presumption of such knowledge. We hold that the other miscellaneous claims of error are without merit,[4] but

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[4] Aiken complains that the trial judge did not sufficiently explain to the jury the issues with respect to his identity. We do not agree. The indictment named in Count I "John Doe, a/k/a 'Leon,' meaning thereby to describe a Negro male of medium complexion, with black hair and a medium build, approximately 40 years old, approximately 5' 9" tall and weighing approximately 165 lbs. * * *" One Leon Ellis testified at considerable length regarding the appellant. He identified the appellant Leonard Royal Aiken as the "Leon" for whom he carried packages of cocaine and to whom Jesse Colson sold large quantities of cocaine on numerous occasions. Although Aiken had been arrested as "John Doe, also known as Leon" on a warrant on May 13, 1961, he did not raise the question of his identity before trial. Judge Wright charged the jury that they must first determine whether the defendants on trial were the defendants named in the indictment. There was no error in his refusal to charge that "If the jury finds * * * that the evidence equally points to the possibility that the defendant named as Leon in the indictment might be Leon known as Schoolboy Ellis, or Leonard Royal Aiken, they must acquit." As the judge had also charged that the jury must find each defendant on trial guilty beyond a reasonable doubt this was all that Aiken was entitled to. There had been no confusion in the evidence.

The appellant Aiken also claims error in the admission against

[fol. 11] my brethren feel that the charge was insufficient. Accordingly, the conspiracy convictions are reversed and remanded for the reasons stated in Judge Hays' opinion. The following views are my own in dissent.

None of the appellants took any exception to the charge on the grounds asserted here, and in any event I would [fol. 12] hold that there is no prejudicial error if the charge is read as a whole.

Although the judge erroneously said that the conspiracy was charged under the general federal conspiracy statute, 18 U. S. C. § 371, rather than the conspiracy clause of 21 U. S. C. § 174, the error made no significant difference, since all the relevant elements of a conspiracy to violate §§ 173 and 174 were properly set forth.[5] I cannot believe

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him of testimony by Agent Murphy that after Aiken had been arraigned by Agent Murphy on May 13, 1961, Aiken said to Murphy "If you get any stuff you want to get rid of, call me, you can trust me." It was not error to receive evidence which the jury could consider as an admission by the defendant that he was willing to deal and had been dealing in narcotics. *United States* v. *Picarelli*, 148 F. 2d 997 (2 Cir.), cert. denied, 326 U. S. 722 (1945); 4 Wigmore, Evidence, § 1061(8) (3d ed. 1940). The judge instructed the jury to consider this only as to Aiken, just as he instructed the jury that Massiah's statements to the customs agents on May 6, 1958 were to be limited to Massiah. In these rulings there was no error as to the other defendants on trial.

We find no error in the claim of the appellants that the indictment did not adequately inform them of the charges. No motion was made with respect to the indictment or for any bill of particulars, nor is there any showing as to how any claimed defect may have prejudiced the appellants.

Anfield claims that it was error for the judge to admit into evidence testimony by Agent Murphy as to a conversation he had in Colson's car on December 5, 1959, which Murphy overheard by means of the Schmidt transmitter. We hold that this was proper evidence for the reasons stated in the discussion of Massiah's substantive case.

None of the other errors alleged are sufficiently substantial to require discussion.

[5] The only real difference between conspiracy under 21 U. S. C. §§ 173 and 174 and a conspiracy under 18 U. S. C. § 371 is that the former section carries much heavier penalties and additional penalties for multiple offenders. Thus these are matters affecting sentence only. The indictment which was sent to the jury during its deliberations plainly charged conspiracy in violation of 21 U. S. C. §§ 173 and 174.

that the jury would not have understood the charge with respect to the necessity of knowledge of importation and the presumption following from possession. The judge read the essential language of the first sentence of § 174, as follows:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of such narcotic drug after importation, *knowingly the same to have been imported illegally*, or conspires to commit any such action in violation of the laws of the United States, shall be punished." (Emphasis added.)

This language is not difficult for a layman to understand, and, given the evidence in the case, which dealt with an importation conspiracy, it would not have been unreasonable for the jury to conclude that the participants knew the importation to be illegal. And in his explanation of the concept of conspiracy, Judge Wright re-emphasized the need to find that each defendant "knowingly and wilfully participated in the unlawful plan with the intent to ad-
[fol. 13] vance and further some object or purpose of the conspiracy," and had the "specific intent to do some act which the law forbids."

Since it is harder for the government to show knowledge of illegal importation than to show the possession required to raise the presumption, the appellants cannot complain of a failure to charge concerning the presumption. Such failure to charge would, given the language alluded to above, have held the government to a higher rather than a lower standard of proof; the jury would, then, have found actual knowledge. Moreover, I think that from hearing the charge as a whole the jury was aware of the existence of the presumption and its relevance to the conspiracy count. Before Judge Wright charged concerning the conspiracy count, he had given instructions on the various substantive counts against Massiah, one of which charged violation of §§ 173 and 174. On that count, he had read the pertinent parts of the statute to the jury and had given a full explanation of the statutory presumption.

When, no more than a few minutes later, he again read the same language of the statute in his instructions on the conspiracy count, he said, "You will note that the conspiracy charges in count 8 relate also to the same substantive offense which is the basis of count 2." I doubt that the jury would so soon have forgotten the explanation of the presumption of knowledge of illegal importation given earlier, or would have been unable to see its relevance to the conspiracy count. While the whole problem of knowledge of illegal importation might have been more explicitly laid out in the conspiracy charge, and it would have been appropriate for the trial judge to clarify the matter had he been requested to do so, I find no prejudice in the charge as given.

As stated above in the summary of the evidence, there was testimony that Massiah and Anfield had themselves [fol. 14] imported cocaine and that Thorn was present when cocaine was removed from shipboard. There was evidence that all four appellants had had actual possession of cocaine. In such a case we ought not to magnify our own preferences as to particular language in the charge out of all proportion to the possibilities of misunderstanding and find reversible error, especially when none of the defense counsel made any objection to the charge. Any errors in Judge Wright's charge were harmless and we should disregard them, as Rule 52(a) of the Federal Rules of Criminal Procedure requires us to do. The majority view gets us pretty close to the proposition that a new trial may be had in criminal cases unless the judge's charge is letter perfect even though defense counsel at the time were perfectly satisfied with it and made no suggestions. I would affirm the conspiracy convictions.

Massiah's substantive convictions are affirmed, and the conspiracy convictions of all four appellants are reversed and remanded for a new trial.

WATERMAN, *Circuit Judge:*

As my colleagues have stated in their respective opinions, I concur with Judge Hays in reversing the convictions of all of the appellants on the conspiracy count, and

I concur with Chief Judge Lumbard in affirming the conviction of appelant Massiah on each of the substantive counts.

HAYS, *Circuit Judge:*

Judge Waterman and I agree that the conspiracy convictions of all the appellants must be reversed because of the failure of the trial court adequately to charge all the elements of the offense. I would, in addition, reverse all four [fol. 15] convictions of the appellant Winston Massiah because the admissions upon which the prosecutions were, in part, based were erroneously admitted in evidence at trial, and on this point I dissent from the views of Chief Judge Lumbard and Judge Waterman.

The appellants, along with several others not defendants in the trial below, were indicted for conspiracy to violate sections 173 and 174 of Title 21, United States Code. In addition Winston Massiah was charged under the same indictment, with three substantive counts relating to narcotics violations under 21 U.S.C. § 184(a) (unlawful possession of a narcotic drug on board a United States vessel), 21 U. S. C. §§ 173, 174, and 26 U. S. C. §§ 4701, 4703, 4704(a), 4771(a) and 7237(a) (possession and dealing in narcotics not in original stamped packages).

In his charge to the jury, the trial judge first dealt with the substantive charges against Massiah. In each case he discussed the crime generally and then listed with great clarity and precision the elements that must be found in order to convict, thus unquestionably leaving with the jurors the impression that these listed elements should be the focus of their consideration. When the trial judge reached the conspiracy charges, he erroneously stated that the conspiracy was charged under the general conspiracy statute 18 U.S.C. § 371, rather than the conspiracy clauses of 21 U. S. C. § 174. While this misconception was not in itself prejudicial, it is the source and the explanation of the errors that followed.[1] The trial judge went on to state

[1] An additional indication of the trial court's misconception, although again not in itself prejudicial for the reasons stated in

[fol. 16] that the conspiracy alleged in the indictment was a conspiracy to violate sections 173 and 174 of Title 21, and to read the pertinent portions of the statute to the jury. Continuing under his misconception that the conspiracy was charged under the general conspiracy statute the judge then discussed extensively the general rules of the law of conspiracy. In conclusion, he summarized the elements which the jury would have to find as follows:

> "In order to establish the offense of conspiracy charged in this indictment the evidence must show beyond a reasonable doubt, first, that the conspiracy described was formed and existed at or about the time alleged. Second, that the accused knowingly and wilfully became members of the conspiracy. Third, that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment on or about the time alleged, at the time and place alleged. And fourth, that such overt act was committed in furtherance of some object or purpose of the conspiracy as charged."

The trial judge failed *at any point* in his charge on the conspiracy count to instruct the jury that knowledge of illegal importation was a necessary element of the conspiracy. And, in addition to what must have been taken by the jury to be an all-inclusive listing of the necessary elements of the crime charged, other statements in the court's general discussion of the law of conspiracy suggested to the jury that knowledge of importation was not necessary:

> "One may become a member of a conspiracy *without full knowledge of all the details of the conspiracy or of all of the conspirators.*
>
> "To participate knowingly and wilfully means to participate voluntarily and understandably and with

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Chief Judge Lumbard's opinion, was the failure of the court to mention the presumption arising from possession. It is, of course, irrelevant that the jury must have found possession, in at least some instances, because knowledge of importation is not automatically presumed as a matter of law from possession, but is an inference that the jury is *permitted* to make. *United States* v. *Mont*, —— F. 2d ——, —— (2d Cir. 1962).

[fol. 17] specific intent to do some act which the law forbids, or with specific intent to fail to do some act which the law requires to be done; that is to say, to participate with bad purpose either to do bad or to disregard the law. So if a defendant or any other person with understanding of the unlawful character of a plan intentionally encourages, assists, advises, for the purpose of furthering the undertaking or scheme, he thereby becomes a knowing and wilful participant in the scheme, a conspirator." (Emphasis supplied.)

Thus, the court charged under the wrong statute (18 U. S. C. § 371) and in so doing omitted to charge, indeed rejected the idea, that the jury must find that the drugs were imported to the knowledge of each defendant in violation of law. Judge Waterman and I find no justification in law or logic for the assertion that this charge was saved by the court's earlier recital of section 173 or by the proper charge on the count charging Massiah with a substantive violation of sections 173 and 174 of Title 21. In view of the charge as a whole, in which the essential elements of each offense were carefully enumerated for the jury, it must be assumed that the jury relied on the court's listing of the elements, and did not consider additional elements provided by their own interpretation of the elements involved in a conspiracy violation of section 174, a question so complex that it has recently evenly divided this court. *United States* v. *Santore*, 290 F. 2d 74 (2d Cir. 1960) (*in banc*). Considering the charge as a whole, Judge Waterman and I are convinced that the jury could not have had the slightest idea that they must find knowledge of importation in order to convict under the conspiracy count.

In a criminal case, the defendant is entitled to have the jury instructed on all the elements that must be proved to establish the crime charged. *United States* v. *Gillilan*, 288 [fol. 18] F. 2d 796 (2d Cir.), cert. denied, 368 U. S. 821 (1961); *Kelley* v. *United States*, 275 F. 2d 10 (D. C. Cir. 1960).

In the present case, the appellants raised no objection to the charge as given, see Rule 30, Federal Rules of Criminal Procedure, but the omission to charge an element of the offense is "plain error," see Rule 52(b), requiring reversal even if the point was not raised below. *Screws* v. *United States*, 325 U. S. 91, 107 (1945); *United States* v. *Levy*, 153 F. 2d 995, 998-99 (3d Cir. 1946); *Williams* v. *United States*, 131 F. 2d 21 (D. C. Cir. 1942). "In a criminal case a court should instruct on all essential questions of law involved in the case, whether requested or not." *Kreiner* v. *United States*, 11 F. 2d 722, 731 (2d Cir.), cert. denied, 271 U. S. 688 (1926); see *Morris* v. *United States*, 156 F. 2d 525, 527 (9th Cir. 1946). In *United States* v. *Noble*, 155 F. 2d 315 (1946), the Third Circuit stated the governing considerations:

> "We think it is self evident that a jury cannot perform its duty of determining the guilt or innocence of a defendant accused of a crime unless they know the essential elements of the crime which he is alleged to have committed. We think it equally self evident that the only appropriate source of that knowledge is the trial judge, whose traditional function has always included that of instructing the jury upon the law. It was because of the failure of the trial judge to give this necessary guidance to the jury that we recently reversed the judgment of conviction in United States v. Levy, 3 Cir., 1946, 153 F. 2d 995. We deemed the error so fundamental that we took note of it even though the defendant had not requested the instructions." 155 F. 2d 316-17.

"[W]here the error is so fundamental as not to submit to the jury the essential ingredients of the * * * offense [fol. 19] * * * it is necessary to take note of it on our own motion." *Screws* v. *United States, supra* at 107.

Although there concededly was sufficient evidence in this case from which the jury could find or presume knowledge of illegal importation, this provides no ground for assuming that it would have done so had the issue been presented to it.

As Judge Waterman concurs in this portion of my opinion, the conspiracy convictions are reversed.

On July 20, 1959, sometime after his arrest, appellant Massiah was indicted with Jesse Colson on three counts, charging substantive and conspiracy violation of 21 U. S. C. § 184a and conspiracy in violation of 21 U. S. C. §§ 173, 174.[2] On July 22, having previously retained counsel, Massiah, along with Colson, pleaded not guilty and was released on bail. Thereafter, without Massiah's knowledge, Colson decided to cooperate with the government. On November 19, 1959 a customs investigator, Finbarr Murphy, placed a transmitter in Colson's car with Colson's knowledge and instructed him to invite Massiah to take a ride with him in the car and to engage Massiah in conversation relating to the alleged crimes. Murphy, who was in another car, was able to pick up this conversation. At trial, he testified to certain admissions that he was able to overhear in this manner. The content of the statements is outlined in Chief Judge Lumbard's opinion.

Massiah's counsel objected, without success, to the admission of Murphy's testimony. That contention is renewed on appeal, in part on the ground that, when a defendant under indictment after preliminary examination [fol. 20] has retained counsel, direct contact between the government and the defendant violates defendant's right to counsel.

In *Spano* v. *New York*, 360 U. S. 315 (1959), the Supreme Court reversed a state criminal conviction on the ground that a confession coerced as a matter of law had been received in evidence. Justices Black, Douglas, Brennan and Stewart, concurring, strongly expressed the view that the confession was inadmissible and the conviction should be reversed without regard to the element of coercion because the police interrogated the defendant after his indictment (but before his preliminary examination) in the absence of counsel, 360 U. S. at 324, 326. Although this view was expressed by only four Justices in *Spano*, the

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[2] It is of no moment, as far as the admission of Massiah's statements is concerned, that the indictment under which Massiah was charged in July, 1959 was superseded by a broader indictment, including additional counts against Massiah and additional defendants, that was made possible in part by the information surreptitiously obtained from Massiah.

question was left open by the others who voted for a reversal on other grounds. Considering that a stricter standard of conduct is imposed by the federal courts on federal law enforcement officials, see *NcNabb* v. *United States*, 318 U. S. 332, 340 (1943); *Marshall* v. *United States*, 360 U. S. 310 (1959), it is reasonable to assume that federal officers must deal through and not around an attorney retained by a defendant under indictment.

Since *Spano*, the New York Court of Appeals has adopted a strict rule rendering inadmissible all statements obtained from an accused after indictment where not made in the presence of counsel; *People* v. *Waterman*, 9 N. Y. 2d 561 (1961); *People* v. *DiBiasi*, 7 N. Y. 2d 544 (1960). Indeed, that court has recently extended the rule to include statements made by an accused after arraignment but before indictment. *People* v. *Meyer*, 11 N. Y. 2d 162 (1962).[3]

> "[T]he initiation of a criminal action against the accused by the finding of an indictment operates to im-
> [fol. 21] pose certain disabilities upon the People. The People would manifestly not be permitted at the trial to call the defendant to the witness stand to establish their case through his testimony. * * * By the same token, they may not circumvent the defendant's privilege against self incrimination by introducing into evidence inculpatory statements obtained from him following indictment) at a private examination prior to the trial, * * *" *People* v. *Waterman*, *supra*, at 566.

Certainly, if such a rule is to have any efficacy it must apply to indirect and surreptitious interrogations as well as those conducted in the jailhouse. In this case, Massiah was more seriously imposed upon than the defendants in any of the cases cited above because he did not even know that he was under interrogation by a government agent. Cf. *Spano* v. *New York*, *supra* at 323.

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[3] In *Meyer*, the court indicated that the rule applies even when a defendant is informed of his right to have counsel present and makes no request for his attendance.

The admissions were introduced generally against Massiah on all four counts. Because the statements were inadmissible, I would reverse Massiah's conviction on all counts. It is irrelevant that other substantial evidence of guilt was introduced at trial. It is not for us to speculate on the course the jury would have taken had these damaging admissions not been before them. *Spano* v. *New York*, *supra* at 324; *Payne* v. *Arkansas*, 356 U. S. 560, 568 (1958).

I would reverse the substantive convictions of Massiah, as well as all the conspiracy counts, for new trials.

[fol. 22]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

* * * *

Present:

HON. J. EDWARD LUMBARD, *Chief Judge*,
HON. STERRY R. WATERMAN,
HON. PAUL R. HAYS,
Circuit Judges.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

WINSTON MASSIAH, MITCHELL ANFIELD, ICKY THORN, LEONARD ROYAL AIKEN, DEFENDANTS-APPELLANTS, JESSE COLSON, ET AL., DEFENDANTS.

JUDGMENT—July 27, 1962

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of conviction of Winston Massiah be and it hereby is affirmed as to the substantive counts.

Further ordered, adjudged and decreed that the orders of conviction of said District Court of all four appellants as to the conspiracy counts be and they hereby are reversed and the action remanded for a new trial in accordance with the opinion of this court.

A. DANIEL FUSARO
Clerk

by VINCENT A. CARLIN
Chief Deputy Clerk

[fol. 23]

[File Endorsement Omitted].

[fol. 24]

IN UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

* * * *

Present:

HON. J. EDWARD LUMBARD, *Chief Judge*,
HON. STERRY R. WATERMAN,
HON. PAUL R. HAYS,
Circuit Judges.

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

WINSTON MASSIAH, DEFENDANT-APPELLANT

ORDER DENYING PETITION FOR REHEARING, ETC.—
October 23, 1962

A petition for rehearing having been filed herein by counsel for the appellant Winston Massiah together with a motion in the alternative to stay the issuance of the mandate and reduce bail pending application for a writ of certiorari to the Supreme Court of the United States,

Upon consideration thereof, it is

Ordered that the petition for rehearing be and it hereby is denied.

Further ordered that the motion to reduce bail be and it hereby is denied.

Further ordered that the issuance of the mandate be and it hereby is stayed in accordance with the provisions of Rule 28(c) of the rules of this court.

A. DANIEL FUSARO
Clerk

[fol. 25]

[File Endorsement Omitted]

[fol. 26]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, APPELLEE

v.

WINSTON MASSIAH, MITCHELL ANFIELD, LEONARD ROYAL AIKEN, and ICKY THORN, APPELLANTS

ORDER DENYING PETITION FOR REHEARING IN BANC—
October 31, 1962

Vincent L. Broderick, United States Attorney, Southern District of New York, New York, N. Y., for appellee.

No active circuit judge having requested that the case be reheard in banc, the petition is denied.

J. EDWARD LUMBARD
Chief Judge

31 Oct 1962

[fol. 27]

[File Endorsement Omitted]

[fol. 28]

SUPREME COURT OF THE UNITED STATES
No. ——, October Term, 1962

WINSTON MASSIAH, PETITIONER

vs.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—November 23, 1962

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including December 3, 1962.

/s/ John Marshal Harlan
Associate Justice of the Supreme Court of the United States.

Dated November 23, 1962

[fol. 29]

SUPREME COURT OF THE UNITED STATES
No. 775 Misc., October Term, 1962

WINSTON MASSIAH, PETITIONER

vs.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Second Circuit.

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—June 10, 1963

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1171.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1963 703705 221

TRANSCRIPT OF RECORD

[redacted]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 199

WINSTON MASSIAH; PETITIONER,

VS.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Volume II

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[fol. a]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

No. 61 Cr. 206

UNITED STATES OF AMERICA,

v.

WINSTON MASSIAH, JESSE COLSON, MITCHELL ANFIELD, GRANVILLE SMITH, NOEL MAXWELL, WILLIAM ADAMS, JOHN HENRY PURRY, CLARENCE WHITE, NICK HOLIDAY, ICKY THORN, SYLVIA FERRIS, JOHN DOE, a/k/a "LEON", meaning thereby to describe a Negro male LEONARD R. AKIN of medium complexion, with black hair and a medium build, approx. 40 yrs. old, approx. 5' 9" tall, and weighing approx. 165 lbs., Defendants.

INDICTMENT—Filed March 3, 1961

The Grand Jury charges:

On or about the 6th day of May, 1958, in the Southern District of New York, Winston Massiah, Jesse Colson and Mitchell Anfield, the defendants, did unlawfully, wilfully and knowingly bring on board, and have in their possession and control on board a vessel of the United States, to wit, the S.S. Santa Maria, while engaged on a foreign voyage, a narcotic drug, to wit, approximately 3 pounds, 8 ounces and 256 grains of cocaine, not constituting a part of the cargo entered in the manifest or part of the ship's stores.

(Title 21, United States Code, Section 184a and Title 18, United States Code, Section 2.)

[fol. b] Second—Count

The Grand Jury further charges:

On or about the 6th day of May, 1958 in the Southern District of New York, Winston Massiah, Jesse Colson and Mitchell Anfield, the defendants, unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the trans-

portation, concealment and sale of a narcotic drug, to wit, approximately 3 pounds, 8 ounces and 256 grains of cocaine, after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, Sections 173 and 174, United States Code), and Title 18, Section 2, United States Code.)

[fol. c] Third—Count

The Grand Jury further charges:

On or about the 18th day of June, 1956, in the Southern District of New York, Granville Smith, the defendant, unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a narcotic drug, to wit, approximately 50 grams of cocaine, after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, Sections 173 and 174, United States Code).

[fol. d] Fourth—Count

The Grand Jury further charges:

On or about the 18th day of June, 1956, in the Southern District of New York, John Henry Purry, Clarence White and Nick Holiday, the defendants, unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the trans-

portation, concealment and sale of a narcotic drug, to wit, approximately 50 grams of cocaine, after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, is prohibited:

(Title 21, Sections 173 and 174, United States Code).

[fol. e] Fifth—Count

The Grand Jury further charges:

On or about the 31st day of July, 1956, in the Southern District of New York, Granville Smith, the defendant, unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a narcotic drug, to wit, approximately 25 grams of cocaine, after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, Sections 173 and 174, United States Code).

[fol. f] Sixth—Count

The Grand Jury further charges:

On or about the 31st day of July, 1956, in the Southern District of New York, Noel Maxwell, the defendant, unlawfully wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a narcotic drug to wit, approximately 25 grams of cocaine, after the said narcotic drug had been imported and brought

into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, Sections 173 and 174, United States Code.)

[fol. g] Seventh—Count

The Grand Jury further charges:

On or about the 6th day of May, 1958, in the Southern District of New York, Winston Massiah, Jesse Colson and Slyvia Ferris, the defendants, unlawfully, wilfully and knowingly did purchase, possess, dispense and distribute a certain narcotic drug, to wit, approximately 3 pounds, 8 ounces and 256 grains of cocaine, in that the said defendants did not purchase, possess, dispense and distribute said narcotic drug in or from the original stamped package.

(Title 26, Sections 4701, 4703, 4704(a), 4771(a) and 7237(a), United States Code).

[fol. h] Eighth—Count

The Grand Jury further charges:

1. From on or about the 1st day of January, 1956, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, and elsewhere, Winston Massiah, Jesse Colson, Mitchell Anfield, Granville Smith, Noel Maxwell, William Adams, John Henry Purry, Clarence White, Nick Holiday, Icky Thorn, Sylvia Ferris, and John Doe, a/k/a "Leon", meaning thereby to describe a Negro male, of medium complexion, with black hair and a medium build, approximately 40 years old, approximately 5'9" tall and weighing approximately 165 lbs., the defendants, and Fadul Rene Harb Huasaff, Richard Roe, a/k/a "Rene", meaning thereby to describe a Caucasian male, of a light complexion with dark hair and a medium build, 35 to 45 years old,

approximately 5'5" tall and weighing approximately 165 lbs., Amanda Huasaff, Helen Hoe, meaning thereby to describe the sister of Amanda Huasaff, a Caucasian female of a light complexion with dark hair and a medium build, approximately 53 years old, approximately 5'5" tall and weighing approximately 135 lbs., Paul King, James Barber, James Hunter, James Billips, Tony Gumbs, Joe Perry, Gerald Youngblood, Clyde Cadogan, Paul Washington, Sonny Campbell, Arthur Conquist, Harold Hoe, meaning thereby to describe the brother-in-law of Amanda Huasaff, a Caucasian male, of light complexion with black hair and a medium build, approximately 55 years old, approximately 5'5" tall and weighing approximately 160 lbs., and George Goe, a/k/a "Canales", meaning thereby to describe a Caucasian male with an olive complexion, with dark hair and a medium build, 35 to 45 years old, approximately 5'8" tall and weighing approximately 150 lbs., named as co-conspirators but not as defendants, and divers other persons to the Grand Jury unknown, did unlawfully, wilfully and knowingly combine, confederate, conspire and agree together and with each other to commit certain offenses against the United States, to wit, to violate Sections 173 and 174 of Title 21, United States Code.

[fol. i] 2. It was a part of said conspiracy that the above-mentioned defendants, and their co-conspirators, would unlawfully, wilfully and knowingly import and bring narcotic drugs, to wit, cocaine, into the United States, in violation of Sections 173 and 174 of Title 21, United States Code.

3. It was further a part of said conspiracy that the above-mentioned defendants, and their co-conspirators, would unlawfully, wilfully and knowingly receive, conceal, buy, sell and facilitate the transportation, concealment and sale of narcotic drugs, to wit, cocaine, the exact amount thereof being to the Grand Jury unknown, after said narcotic drugs had been imported and brought into the United States contrary to law, and knowing that said narcotic drugs had been imported and brought into the United States contrary to law, in violation of Sections 173 and 174 of Title 21, United States Code.

Overt Acts

In furtherance of said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York:

1. On or about June 18, 1956, the defendants Granville Smith, John Henry Purry, Clarence White and Nick Holiday, had a conversation in a building in the vicinity of 100th Street and Manhattan Avenue, New York, New York.

2. On or about July 31, 1956, the defendants Granville Smith, Winston Massiah and John Henry Purry had a conversation in a bar at 10th Avenue and 17th Street, New York, New York.

3. On or about July 31, 1956, defendant Winston Massiah had a conversation with co-conspirator James Barber aboard the vessel S. S. Santa Luisa.

4. On or about July 31, 1956, defendants Noel Maxwell and Winston Massiah had a conversation at 19 West 128th Street, New York, New York.

[fol. j] 5. On or about July 31, 1956 defendants Noel Maxwell, William Adams and Winston Massiah had a conversation at 19 West 128th Street, New York, New York.

6. In or about the month of August, 1956 defendants Mitchell Anfield, John Henry Purry, Clarence White and Nick Holiday had a conversation in a building in the vicinity of 100th Street and Manhattan Avenue, New York, New York.

7. On or about October 8, 1956 defendants Noel Maxwell, William Adams and Winston Massiah had a conversation at 19 West 128th Street, New York, New York.

8. On or about October 10, 1956 defendants Noel Maxwell, William Adams, Mitchell Anfield and Winston had a conversation at 19 West 128th Street, New York, New York.

9. On or about October 11, 1956 defendants John Henry Purry, Clarence White and Nick Holiday had a conversation in a building in the vicinity of 100th Street and Manhattan Avenue, New York, New York.

10. On or about October 11, 1956 defendants Clarence White, Winston Massiah and Nick Holiday had a conversation at 19 West 128th Street, New York, New York.

11. On or about December 10, 1956 defendants John Henry Purry, Clarence White and Nick Holiday had a con-

versation in a building in the vicinity of 100th Street and Manhattan Avenue, New York, New York.

12. On or about December 10, 1956 co-conspirator James Hunter went to the vicinity of 8th Avenue and 16th Street, New York, New York.

13. On or about December 10, 1956 defendants Mitchell Anfield, John Henry Purry, Clarence White and Nick Holiday had a conversation in a building in the vicinity of 100th Street and Manhattan Avenue, New York, New York.

[fol. k] 14. On or about June 4, 1957 co-conspirator James Barber went to a bar in the vicinity of 8th Avenue and 16th Street, New York, New York.

15. On or about July 17, 1957 co-conspirator James Hunter went to a bar in the vicinity of 8th Avenue and 16th Street, New York, New York.

16. On or about July 31, 1956 co-conspirator James Barber went to the vicinity of 8th Avenue and 16th Street, New York, New York.

17. On or about August 26, 1957 co-conspirator James Hunter went to the vicinity of 8th Avenue and 16th Street, New York, New York.

18. On or about November 18, 1957 co-conspirator James Billips went to the vicinity of 17th Street and 9th Avenue, New York, New York.

19. On or about December 30, 1957 co-conspirator James Billips went to the vicinity of 9th Avenue and 17th Street, New York, New York.

20. On or about February 10, 1958 co-conspirator James Billips went to a bar in the vicinity of 9th Avenue and 17th Street, New York, New York.

21. On or about May 6, 1958 defendant Winston Massiah was in possession and control of a quantity of adhesive tape aboard the vessel S.S. Santa Maria.

(Title 21, United States Code, Sections 173 and 174).

Morton S. Robson, United States Attorney.

John C. Bunny, Foreman.

[fol. l] March 13, 1961. Anthony F. Marra, Assigned as Attorney to Slyvia Ferris.

B. Moldow, of counsel, Pleading adjd. to 3/14/61.
MacMahon, J.

March 15, 1961. Anthony F. Marra, Esq. relieved of assignment as attorney for Sylvia Ferris—

Defendant has retained other counsel.

Sylvia Ferris Pleads not guilty—Remanded in lieu of bail $3000 fixed on 3/6/61. MacMahon, J.

March 16, 1961. Clarence White—Produced in Court on writ and Pleads not guilty. Murphy, J. O.

May 13, 1961. John Doe, a/k/a Leon, true name Leonard Royal Aiken—

Deft. brought to Court on warrant. Arraigned in chambers, following his arrest on warrant. Bail fixed at $20,000. Remanded in lieu of bail. Weinfeld, J.

May 15, 1961. Leonard Royal Aiken—Pleads not guilty —Bail of $20,000 fixed on 5/13/61 by Judge Weinfeld continued in the same amount. Deft. remanded in lieu of bail.
Dimock, J.

—June 13, 1961. Gov't. Motion to sever as to Defts. Jesse Colson and Sylvia Ferris from trial—Granted.

Trial begun before Wright, J., with a jury as to defts.— Massiah, Anfield, Maxwell, Adams, Purry, White, Thorn, and John Doe (true name Leonard R. Aiken).

Deft. Clarence White produced in Court on a writ from State Prison, Dannemola, N. Y.

[fol. m] On Motion of the Government the following defts.—Winston Massiah, Mitchell Anfield, Noel Maxwell, William Adams, John Henry Purry, Icky Thorn, and Leonard Aiken—Ordered REMANDED— Wright, J.

June 14, 1961. Trial continued and concluded—

Defts.—Massiah, Anfield, Maxwell, Adams, Purry, White, Thorn and Leonard Aiken. Motion for a mistrial granted. Defts. remanded. Wright, J.

June 15, 1961. Gov't. Moves to Vacate the severance of Deft. Jesse Colson and proceed to trial. Court vacates the severance of the Deft. Jesse Colson.

Deft. Jesse Colson (Atty. present) withdraws plea of not guilty and pleads Guilty to counts 1-2-7 and 8

June 15, 1961. Deft. Jesse Colson—Sentenced to Eight

(8) years on each of Counts 1-2-7 and 8, to run concurrently with each other, at a place of confinement designated by the Atty. General of the U.S. Deft. Remanded—Wright, J.

Government moves to sever the Defts. Maxwell, Adams, Purry, and White—Granted.

The Court fixes the same amount of bail previously had by the Defts. Maxwell, Adams and Purry. Maxwell bail fixed $3500.—Adams bail fixed $3500.—Purry bail fixed $3000. Defts. Remanded in lieu of bail.

June 15, 1961. Trial begun before Wright, J., with a jury as to Defts. Massiah, Anfield, Thorn and Aiken.

June 16, 1961. Trial Cont'd—

June 19, 1961. Trial Cont'd.—

[fol. n] June 20, 1961. Trial Cont'd.—

June 21, 1961. Trial Cont'd.—

June 22, 1961. Trial Cont'd.—

June 23, 1961. Trial Cont'd.—

On Motion of the Government bail fixed as to the following Defts.—

Winston Massiah—Bail fixed at $15,000.
Mitchell Anfield—Bail fixed at $7,500.
Icky Thorn—Bail fixed at $7,500.
Leonard Aiken—Bail fixed at $30,000.
All Defts. remanded in lieu of bail. Wright, J.

June 26, 1961. Trial Cont'd.—

June 27, 1961. Trial Cont'd—

Deft. Massiah moves to dismiss counts 1-2-7 was denied.

Deft. Anfield moves to dismiss counts 1-2 and 8 granted as to counts 1 and 2—denied as to count 8.

Deft. Thorn moves to dismiss count 8—Denied.

Deft. Aiken moves to dismiss count 8—Denied.

June 28, 1961. Trial Cont'd.—

June 29, 1961. Trial Cont'd—

Jury verdict—Deft. Massiah guilty on counts 1-2-7 and 8.

Deft. Anfield, Thorn and Aiken. Guilty on count 8 jury polled.

Defts. Massiah, Anfield, Thorn and Aiken move to set aside the verdict, and for a new trial—denied.

Winston Massiah (atty. present) sentenced to nine (9) years on each of counts 1-2-7 and 8 to run concurrently with each other.

Bail pending appeal fixed at $15,000. Wright, J.

[fol. o] June 29, 1961. Mitchell Anfield—(atty. present) sentenced to nine (9) years on count 8.

Bail pending appeal fixed at $15,000. Wright, J.

Icky Thorn—(atty. present) sentenced to nine (9) years on count 8.

The Marshal is instructed to make a determination as to whether or not the deft. is eligible to go to U.S. P.H.S. Hospital, Lexington, Kentucky for a cure of his addiction prior to being sent to customary institution.

Bail pending appeal fixed at $15,000. Wright, J.

Leonard Royal Aiken—(atty. present) sentenced to thirteen (13) years on count 8.

Bail pending appeal is fixed at $50,000. Wright, J.

[fol. p] March 3, 1961. Granville Smith, Neil Holiday, John Doe—("Leon") Warrants of arrest ordered.

Bicks, J.

March 6, 1961. Sylvia Ferris—Bail fixed at $3,000. Remanded in lieu of bail.

Pleading adjd. to 3-13-61. MacMahon, J.

March 9, 1961. Winston Massiah Pleads not guilty—bail of $7,500. in Cr 159-216 to be rewritten to cover this indictment by 3-13-61.

Jesse Colson Pleads not guilty—bail of $7,500. in Cr 159-216 to be rewritten to cover this indictment by 4 p.m.

Mitchell Anfield Pleads not guilty—Bail of $2,500. to be rewritten by 4 p.m. today.

Noel Maxwell Pleads not guilty—Bail continued. ($3,500)

William Adams Pleads not guilty—Bail continued. ($3,500)

John Henry Purry Pleads not guilty—Bail continued. ($3,000)

Icky Thorn Pleads not guilty—Bail of $3,000. to be rewritten by 4 p.m. today (Norman D. Archer, Esq. attorney for deft. Thorn admitted pro hac vice)

MacMahon, J.

61 tr. 206

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

THE UNITED STATES OF AMERICA,

vs.

WINSTON MASSIAH, et al. (as listed and described in the within indictment), Defendants.

INDICTMENT

Viol: T.21, §§ 173,174 USC, T.21, § 184a, USC, T.18, § 2, USC T.26, §§ 4701, 4703 et seq. USC

Morton S. Robson, United States Attorney.

A true bill

John C. Bunny Foreman.

Filed United States District Court S.D. of N.Y. March 3, 1961

[fol. q] IN UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

No. 61 Cr. 206

UNITED STATES OF AMERICA,

v.

WINSTON MASSIAH

JUDGMENT AND COMMITMENT—Filed July 12, 1961

On this 29th day of June, 1961 came the attorney for the government and the defendant appeared in person and [1] by counsel

It is adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by a jury of the offense of unlawfully, wilfully and knowingly

bringing on board, and having in his possession and control on board of a vessel of the United States engaged on a foreign voyage, a quantity of cocaine. (Title 21, Section 184a & Title 18, Sec. 2 U.S. Code.); receiving, concealing, selling and facilitating the transportation and concealment and sale of cocaine. (Title 21, Secs. 173 & 174 & Title 18, Sec. 2, U.S. Code.); purchasing, possessing, dispensing and distributing cocaine not in or from the original stamped package. (Title 26, Secs. 4701, 4703, 4704(a), 4771(a) & 7237(a) U.S. Code.); conspiracy to violate the narcotic laws. (Title 21, Secs. 173 & 174 U.S. Code.) as charged in counts 1-2-7 and 8 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is adjudged that the defendant is guilty as charged and convicted.

It is adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Nine (9) Years on each of counts 1-2-7 and 8 to run concurrently with each other.

Bail pending appeal fixed at $15,000.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

J. Skelly Wright, United Sates District Judge.

Herbert A. Charlson, Clerk.

A True Copy. Certified this 29th day of June, 1961.

(Signed) Herbert A. Charlson, Clerk.

(By) Otto Waldmann, Deputy Clerk.

KS 6/29/61.

[fol. r] Defendant committed 6/13/61. following arrest: was not released on bail.

Thomas J. Lunney.

Warden federal detention Hdqrts., New York, N. Y. for service of sentence at that institution, or for transportation to another institution designated by the attorney general, by prison van.

Thomas J. Lunney United States Marshal Southern District of New York.

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on June 30, 1961 to—
Defendant noted appeal on—.
Defendant released on—.
Defendant elected, on — not to commence service of the sentence.
Defendant's appeal determined on—.
Defendant delivered on—to—at —, the institution designated by the Attorney General, with a certified copy of the within Judgment and Commitment.

——, ——
United States Marshal.

[fol. s] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

No. 61 Cr. 206

UNITED STATES OF AMERICA,

vs.

WINSTON MASSIAH, Defendant,

NOTICE OF APPEAL—Filed June 30, 1961

Acknowledgment of service (omitted in printing)

Offense: Violation of Title 21 United States Code Section 184a and Title 18 United States Code, Section 2 and Title 21 Section 173 and 174 and Title 26 Sections 4701, 4703 4704(a) and 4771(a), and 7237(a) United States Code and Title 21 Section 173 and 174.

Date of Judgment: June 29, 1961

Sentence: 9 years imposed following trial and conviction by jury on each count, sentence to run concurrently.

Now confined in Federal Detention Headquarters # 427 West Street New York City, N.Y.

The appellant hereby appeals from the judgment of conviction and sentence thereon to the United States Court of Appeals, Second District.

Robert J. Carluccio, Esq., Attorney for Appellant,
150 Broadway, New York City, N.Y.

Dated, New York, June 29, 1961.

[fol. t] Proof of Service (omitted in printing)

[fol. 1] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

61 Cr. 206

UNITED STATES OF AMERICA,

vs.

WINSTON MASSIAH, JESSE COLSON, MITCHELL ANFIELD, GRANVILLE SMITH, NOEL MAXWELL, WILLIAM ADAMS, JOHN HENRY PURRY, CLARENCE WHITE, NICK HOLIDAY, ICKY THORN, SYLVIA FERRIS, JOHN DOE, also known as "LEON", meaning thereby to describe a Negro male of medium complexion, with black hair and a medium build, approximately 40 years old, approximately 5'9" tall, and weighing approximately 165 lbs., Defendants.

Transcript of Jury Trial

Before: Hon. J. Skelly Wright, D. J., and a Jury.

APPEARANCES:

Robert M. Morgenthau, Esq., United States Attorney, for the Government; By James G. Starkey, Esq., Assistant United States Attorney.

Robert J. Carluccio, Esq., Attorney for Defendant Massiah.

[fols. 2-12] Eugene K. Jones, Esq., Attorney for Defendant Colson.

I. Edward Pogoda, Esq., Attorney for Defendant Anfield.

Jesse Zaslav, Esq., Attorney for Defendants Maxwell, Adams and Purry.

Abraham Solomon, Esq., Attorney for Defendant White.

Norman Archer, Esq., Attorney for Defendant Thorn.

Earl McHugh, Esq., Attorney for Defendant Ferris.

Morris Somers, Esq., Attorney for Defendant Aiken.

. . . . . .

[fol. 13] COLLOQUY

The Court: Do you understand that you have entered a plea of guilty? Do you understand that?

Defendant Colson: Yes.

The Court: Has anybody promised you anything, or threatened you in any way so that you would enter this plea of guilty on the basis of those promises or threats?

Defendant Colson: Judge, my wife and my children were approached in the street and threatened that if I take the [fol. 14] witness stand that they would be killed while I am away, and there were two New York City policemen who stopped me and told me that if I get on the stand and testify that I could be left in a place with my brains blown out, and I would be put in a place like a robber, and I would have my head shot off, and if I should happen to live out of it, who would believe me anyway because I got a police record, and I shot somebody, and I got a narcotic record, and I am an informer.

The Court: What are the names of the two New York City policemen?

Defendant Colson: Your Honor, I wish I knew but I don't know. My wife was approached in the street and threatened and called on the phone, and the agents changed my phone number. They put guards around my house, and my kids can't walk out of the house without a guard, and they can't go to school, and it's got me upset. I wanted to testify but I can't. I just couldn't do it. I tried and they told me I could get all this time, and my wife and children's lives is at stake, and I just couldn't do anything about it. I couldn't leave my wife and kids back here exposed to something like that.

They said it don't happen, but it does. I can just leave it [fols. 15-37] in the hands of God—my guilt.

The Court: My question is whether or not you are pleading guilty by reason of any promises that were made to you.

Defendant Colson: No, sir.

The Court: Are you pleading guilty because of any threats that were made to you by the Government or by anybody else?

(No response.)

The Court: I understand you have been threatened, according to what you say.

The question now is whether or not you are pleading guilty because of any threats. Has anybody threatened you into pleading guilty?

Defendant Colson: No, not in that respect, Judge.

. . . . . .

[fol. 38] ELITA LLOYD, called as a witness in behalf of the government, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Stakey:

Q. Will you kindly speak as loudly as you can, Miss Lloyd, so that the jury and the Court can hear you.

A. Yes.

Q. Do you know a man by the name of Winston Massiah, Miss Lloyd?

A. I do.

Q. Do you see him in the courtroom?

A. Yes.

Q. Will you point him out, please.

A. (Witness points.)

The Court: Well, suppose you tell us. Now there is a table, a second table, and the chairs against the little rail there. Now tell us where he is.

The Witness: Right there.

The Court: Will the record show that she identified the defendant.

Q. When did you first meet Winston Massiah, Miss Lloyd?

A. 1950, in May.

Q. Where did you meet him?

A. At my sister's house, at 30 east 128th Street.

[fol. 39] Q. And who introduced you to him?

A. A friend of my sister's.

Q. Were you living there at the time?
A. Yes, I was.
Q. How long did you continue to live there?
A I lived there until July 1st of the same year.
Q. Where did you move to then?
A. To 19 East 128th Street.
Q. Do you know where Massiah lived at that time?
A. Well, he was still living with my sister at 30 East 128th Street.
Q. And he was living there as a roomer?
A. Yes, he was.
Q. Did there come a time when he moved from there, if you know?
A. Yes, there did.
Q. When was that?
A. About September of 1950.
Q. Do you know where he moved to?
A. He came over to live with me at 19 East 128th Street.
Q. Was there a financial arrangement at that time?
A. Yes, there was.
Q. What did you give him and what did he pay?
[fol. 40] A. Well, he paid $6 for the room.
Q. One room?
A. Yes.
Q. How often did he use it thereafter?
A. About, I think, every thirty-some days he would be in for three or four days, five days at the most.
Q. Did he ever tell you where he was during that 30-day period, or 30-odd-day period?
A. At sea.

Mr. Carluccio: Objection. It would be hearsay, where he was.

The Court: That is overruled. The question was what the defendant had told her. Overruled.

Where did he say he was?

The Witness. He was at sea. He was working on a ship.

Q. Now, when was it that he moved in?
A. About September.
Q. How long did he continue to live there?
A. He lived there until '56, around October some time.

Mr. Pogoda. If the Court please, I can't hear this witness.
[fol. 41] The Court: All right, sir.
Would you keep voice up loud so that counsel and the defendants can also hear you as well as the jury?
The Witness: Yes.

Q. Did there come a time, Miss Lloyd, when you met some friends of Massiah?
A. Yes, there did.
Q. At the apartment?
A. Yes.
Q. When did you begin meeting these friends?
A. Around '56 in May or June.

The Court: Keep your voice up.
The Witness: About '56, May or June.

Q. Do you remember the names of any of them?
A. Yes, I do.
Q. Whom did you meet in May or June?
A. I met Maxie, Hawk, Jesse, I think—
Q. Do you know what the full name of the man introduced to you as Maxie is?
A. No, I don't know his full name.
Q. Do you recall the name Noel Maxwell?

Mr. Pogoda: I object. He is not one of the defendants on trial. He is not on trial now, and I submit that it has no business in this case.
[fol. 42] The Court: Well, I think counsel is trying to set up proof for his conspiracy which involve not only the ones on trial, but also the others who were named, so I will overrule the objection.
Mr. Carluccio: May I object on the ground that it is leading.
The Court: I will sustain that objection.
Don't lead the witness.

Q. Do you know what Hawk's name is?
A. No, I don't know his name. Just Hawk.
Q. Do you know what Jesse's full name is?
A. Yes, I do.
Q. What is his last name?

A. Colson.

Q. And when did you meet Colson?

A. I met Colson about June or July, I think it was.

Q. At your apartment.

A. Yes, I did.

Q. Who introduced you to him?

A. Winston did.

Q. Did you ever hear any conversations between Winston and Jesse Colson during this period?

A. No, I did not.

[fol. 43] Q. Now, did there come a time, Miss Lloyd, when you saw some men whom you did not recognize, in the apartment?

A. Yes, there did.

Q. When did that occur?

A. That was about October of 1956.

Q. Would you tell the Court and jury exactly what happened on that day.

A. One morning I was making breakfast and the doorbell rang. When I opened the door these two strange men were there to see Winston, so I called to him and he said to let them come in.

Q. Into his room?

A. Yes. They came in. One of them went into his room and one sat in the living room. He asked for a cup of coffee and I gave him the coffee, and asked him did he want some toast, and he said yes, he would take some toast, so I went back to make some toast, and the bell rang again and another man came in.

I asked him did he want coffee, and he said no. So I asked him would he have a drink, and he said yes, and I gave him a drink. I went back into the kitchen, and after a while they left.

So I went in, when I was through doing my work in the kitchen, I went inside, and Winston was very upset.

[fol. 44] So I asked him what happened.

Mr. Carluccio: Objection. I think it is not responsive. All he asked is what happened that day.

The Court: I think we are still on the same day, so I will overrule the objection.

Finish your story, please.

A. (Continuing) I asked him what had happened, and he said that they were not cops.

So I said, "Why cops?"

He got very upset and he was sick and he couldn't answer any more for a long time.

Q. Did he say they were or they were not cops?

A. They were not.

Q. What else did he say then?

A. He got sick, and we had to call the doctor for him. He was very upset.

Q. Did you have any further conversation with him?

A. Later that evening I asked him what really happened, and he said that he had some money——

Mr. Pogoda: If the Court please, I object to any conversation not in the presence of the defendant Anfield [fol. 45] insofar as it relates to the defendant Anfield.

The Court: The Court will overrule the objection. I assume counsel is attempting to prove the conspiracy, and the acts and statements of any one of the conspirators in furtherance of this conspiracy are admissible as against all. However, it is a question for the jury as to whether or not these acts and these statements are in furtherance of any conspiracy. Whether or not, first, of course, there will be a conspiracy proved which the jury will have to determine, and then whether or not these acts which are being testified to, if you believe that they happened as the witness says they happened, whether or not they were in furtherance of the conspiracy. But we will get into that as we go along, so let's proceed.

Mr. Starkey: Thank you, your Honor.

By Mr. Starkey:

Q. What were the further conversations that you had with Winston Massiah that day?

A. He said he had some money to go away and they had followed him and taken the money away from him.

Q. Did he say where he got the money?

A. At the bank.

Q. Was there any further conversation?

[fol. 46] A. Not that day. I called him to call the police

and tell them about it, and he said they had threatened him and he couldn't do it.

Q. Now, did there come a time thereafter when you again discussed the events of that day with Massiah?

A. The following evening Jesse Colson came by and he brought some friends there——

Mr. Somers: I can't hear that, your Honor.

The Court: He said that the following evening Jesse Colson came by and brought some friends with him.

Q. Did you have any discussion with Massiah about a gun?

A. Yes, your Honor.

Mr. Somers: I object to that.

Mr. Carluccio: That is leading. There is no testimony whatsoever about a gun.

The Court: That is overruled.

Did you or didn't you?

The Witness: Yes, I did. I asked him if there was supposed to be a gun. I asked him whether it was a real gun or a toy pistol, and he said he didn't know.

Q. A gun in the possession of the men who had been there?

Mr. Carluccio: Objection, your Honor. It is leading.

[fol. 47] The Court: Sustained. Don't lead.

Q. Was there anything else said about the gun?

A. No.

Q. Now, you say Colson came thereafter?

A. Yes, he came the following night and he brought some friends with him.

Q. Did you hear any conversation—how many people were there then?

A. Two people.

Q. Two people with Colson?

A. Yes.

Q. Did you hear any of the conversation then between them and Winston?

A. I overheard something about some money and some stuff.

The Court: Speak up, please. Some money and some stuff? Is that what you said?

The Witness: Yes, your Honor.

The Court: Speak in a loud voice so that everybody can hear you.

Q. Did you hear any more conversation before they left?

A. No, I didn't.

[fol. 48] Q. Did there come a time after they did leave when you had another conversation with Massiah?

A. I asked him what the stuff was about and he said him and Jesse was in something illegal.

Q. What did you say?

A. I got angry then and fussed, I fussed at him and told him that we would have to move away from there.

Q. Was there any further conversation?

A. Another night I think they came back——

The Court: Speak louder, please.

A. (Continuing) They came back the following night again and asked——

Q. What happened on that occasion?

A. Winston wasn't there. He was visiting upstairs. And I went up to get him, and when we were part way dawn the steps Jesse came up and he was fussing and laughing at him for being afraid.

Q. Laughing at Massiah?

A. Yes.

Q. Did you hear any more conversation on that occasion?

A. No, I didn't.

Q. Do you know Mitchell Anfield?

A. No, I don't know him.

[fol. 49] Q. Duke?

A. Yes, I know him.

Q. Did you ever have any conversation with Winston around this time concerning what he and Jesse had been doing?

A. Yes. I asked him what it was.

Q. What did he say?

A. Coke.

Q. When did this conversation occur?

A. One of the nights before he moved away.

Q. What else was said at that time, or what was said beforehand?

A. (No response.)

Q. In connection with his answer?

A. I don't understand the question.

Q. Before he said coke what did you say and what did he say?

A. I asked him what it was they were dealing in, and when he said that, I told him then that it was very dangerous and we were all in a situation where we could either have gotten killed or gone to jail.

Q. Was there any further conversation about this?

A. He said he was sorry and that he would move away.

[fol. 50] Q. Now, when did you first meet the man you know as Duke?

A. A few days after that happened, Jesse brought him by and introduced him to me and said he was his brother.

Q. Do you see Duke in the courtroom?

A. Yes, I do.

Q. Will you point him out, please.

A. Right there (pointing).

Q. What color clothes is he wearing?

A. A pink shirt.

Q. A pink shirt?

A. Yes.

Mr. Starkey: May the record show that the witness has identified the defendant Mitchell Anfield?

The Court: Yes.

Q. Was there any further conversation at that time when Jesse Colson introduced Duke to you?

A. No. He just said hello and asked how is everybody doing, and something like that, and then they left.

Q. Do you know a man by the name of James Barber—Jimmie Barber?

A. Yes, I do.

[fol. 51] Q. When did you meet him?

A. A few days after that happened I met him once. He came to the house one time.

Q. A few days after the business with the strangers in the apartment?

A. Yes.

Q. Did you hear any conversation between him and Massiah at that time?

A. No, I didn't.

Q. Who introduced you to Barber?

A. Well, we were not introduced.

Q. You just saw him?

A. Yes.

Q. In whose presence?

A. (No response.)

Q. Who was there?

A. Winston was there.

Q. Did there come a time thereafter when he did move out, when Massiah did move?

A. Yes, there did.

Q. Do you know where he moved to?

A. He moved over to 8 East 128th Street.

Q. Did there come a time when he talked to you again about moving back in?

A. Yes.

[fol. 52] Q. When was that?

A. About five or six months later.

Q. So that would be in the spring of '57?

A. About that.

Q. What was the conversation you had with him at that time?

A. I don't remember the exact conversation but he wasn't well. He wasn't feeling well, and I think he wasn't working, or something. I am not sure.

Q. Well, what did he say to you, as best you can recall?

A. He said he wasn't working, and he wasn't feeling well, and he didn't want to be there alone because most of the time he was sick. He was supposed to have had a bad heart. And most of the time he would be sick, and he wouldn't have any money, and things like that.

Q. What else was said?

A. And so I told him, all right, he could come on back.

Q. He asked you if he could come back?

A. No.

Q. On that occasion?

A. No, not exactly. We were just discussing his illness [fol. 53] and rough times, and all that, and I told him he

could come on back over there because it was very hard for him alone where he was.

Q. Did you have any discussion about the past at this time?

A. Yes. He said he never would do anything like that again.

Q. And then he did move back in?

A. Yes, he did.

Q. Now, did you see any of his friends around the apartment thereafter?

A. For a long time I didn't see anyone.

Q. How much time passed, would you say?

A. Oh, it must have been a year, I think.

Q. And whom did you see then?

A. Then I saw Maxie and Hawk, they came back about twice and visited him for a while.

Q. And that would be in the spring of '58 or the early part of 1959, about a year later?

Mr. Carluccio: Objection, your Honor. She should testify to the time.

The Court: I think she has already testified that it was about a year later.

In other words, you testified, as I understand it——

[fol. 54] The Witness: I don't know exactly, but it was a very long time. It seemed about a year.

Q. Now, after Massiah returned and you saw Maxie and Hawk again, did there come a time when you saw Jesse?

A. Yes.

Q. When did you see him again?

A. Well, Jesse—he didn't stop coming. He used to come off and on and visit.

Q. When did you see him again after the incident with the men in the apartment, the strange men?

A. I think the day after.

Q. Well, after Winston moved out did you see any more of Jesse before he moved back in?

A. No.

Q. And he moved back in how long after he moved out?

A. About five or six months.

Q. Five or six months after October of '56; is that right?

A. Yes.

Q. Now, after he moved back in then in the early part of 1958, when did you next see Jesse?

A. Well, soon after he moved back in, Jesse came. Jesse would visit him often.

[fol. 55] Q. How often did he visit him thereafter?

A. I can't say exactly how often, but he used to come by every so often.

Q. About how many times would you say you saw him before May of 1958?

A. I can't say in numbers how many times.

Q. Now, did there come a time after you began seeing Maxie, Hawk and Jesse coming around to see Winston again when you received a letter from Winston?

A. Yes, I did.

Q. When was that?

A. That was just before he was arrested.

Q. On this charge?

A. Yes.

Q. And do you remember when he was arrested for this charge on which he is now on trial?

A. It was 1958, either May or June.

Q. And how long before this occurred did the letter come?

A. He was at sea when the letter came.

Q. And how long had it been since you had seen him before the letter came?

A. A few weeks, I think.

Q. He had been out in a few weeks and he had not yet gotten back, and you received a letter?

[fol. 56] A. That's right.

Q. Do you still have the letter?

A. No, I don't.

Q. Do you know what happened to it?

A. I gave the letter to Jesse.

Q. Will you tell the Court and jury what the letter said.

Mr. Pogoda: Objection, if the Court please.

The Court: On what basis do you think the letter is admissible so that she can testify to this?

Mr. Starkey: May I approach the bench, your Honor?

The Court: Well, let me ask you this: How did you know the letter was from Massiah?

The Witness: Because it had his return address on it.

The Court: Is that the only reason why you knew it was from Massiah? Did you know his handwriting, for example?

The Witness: Yes, I did.

The Court: Did you recognize his handwriting in this letter?

The Witness: Yes, I did.

The Court: Did he sign the letter?

[fol. 57] The Witness: I think he did; yes.

The Court: And you recognized the handwriting throughout the letter as being Massiah's?

The Witness: I believe I did.

The Court: Did you customarily receive letters from him?

The Witness: Once in a while. Not very often.

The Court: There isn't any doubt in your mind that this letter was written by Massiah?

The Witness: No, I don't think so.

The Court: Well, the Court is going to overrule the objection. The witness has shown that she doesn't have possession of the letter anymore and consequently she is in a position to testify to what was in it since she does say that she knows that it was written by Massiah, so I will overrule the objection.

Mr. Somers: Your Honor, may I note for the record that I except to that ruling on the ground that the letter, of course, is the best evidence. This is secondary evidence, and the reason given is certainly not sufficient to overcome the rule of best evidence, the best-evidence rule.

The Court: All right, sir.

Proceed. Answer the question. Tell us what was in [fol. 58] the letter.

The Witness: Well, he wrote the usual letter saying "Hello," and "How are you?" and all, and then he sent a message in to Jesse. He said that I should call him and tell him he will bring in some discos, which is a Spanish word for phonograph records; so I called Jesse and gave him the letter.

By Mr. Starkey:

Q. Did you have any conversation with Jesse at that time?

A. No; I just told him that Winston had sent this message to him, and then he asked me to call Duke, and I called Duke, and they came and then they went away.

Q. You called Duke?

A. Yes.

Q. At Jesse's request?

A. Yes.

Q. And what did you say to Duke?

A. That Jesse asked him to meet him at my house.

Q. And did Duke come over thereafter?

A. Yes.

Q. What happened when he arrived?

A. Nothing. He just said hello to me and him and [fols. 59-127] Jesse left. Jesse waited there until he came, and then they left?

Q. Did you see Duke and Jesse thereafter?

A. I saw Jesse after that.

Q. When did you see Jesse next?

A. I don't remember exactly.

Mr. Starkey: I have no further questions of this witness, your Honor.

* * * * * * *

[fols. 128-130] Redirect examination.

By Mr. Starkey:

* * * * * * *

[fols. 131-135] Mr. Somers: I will object to that.

The Court: That is overruled.

What do you mean when you use the word "coke"?

The Witness: I understand it to be cocaine.

* * * * * * *

[fol. 136] JAMES BARBER, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. Starkey:

Q. What is your occupation, Mr. Barber?
A. Longshoreman.
Q. Do you know Winston Massiah?
A. Yes, I do.
Q. When did you first meet him?
A. In 1956.
Q. What part of the year?
A. During the year.
Q. Do you see him in the courtroom?
A. Yes, I see him behind you.
Q. Will you point him out, please?
A. Behind the gentleman with the glasses on there.

Mr. Starkey: Let the record show that the witness has identified Winston Massiah.

The Court: What kind of shirt has he got on?

The Witness: A tan short, a brown shirt.

The Court: Let the record show that he identified the defendant Massiah.

Q. Where did you first meet Winston Massiah, Mr.
[fol. 137] A. On the ship.
Q. What pier?
A. Pier 58, North River.
Q. That is a Grace Line pier?
A. That's right.
Q. Where have you worked as a longshoreman?
A. What did you say?
Q. Where have you worked as a longshoreman?
A. Me?
Q. Yes.
A. I worked with M. P. Holly, 17 State Street. That was the office. And they had a contract with the Government during the war.

The Court: And where else?

The Witness: I worked for the United States at Pier 59,

but for a short while. And I worked for Preston Stevedoring Company. At least he was the contractor.

Q. Have you been convicted of any crimes?
A. I have, sir.
Q. What ones?
A. I had an assault down South in 1937.
Q. Do you recall any others?
A. Well, I——

[fol. 138] The Court: You were convicted once for assault. Any other convictions?

The Witness: No.

The Court: Is that the only conviction?

The Witness: Walking in, and I worked in where there was gambling, and there was a raid.

The Court: And you were arrested in the raid?

The Witness: I was arrested and taken to enter a plea. I pleaded guilty and I paid $1 and got out.

Q. That was a gambling charge?
A. Yes.
Q. And the word you used was "raid"?
A. Yes.
Q. When you first met Massiah in the spring of 1956, did you have a conversation with him?
A. I did so.
Q. What did he say and what did you say?
A. He asked me did I want to take a package out for him and make some money, and I said, "Like what?" I said, "What's in it?"

He said, "Don't worry about it."

Q. And this was aboard a Grace Line vessel?
A. That's right.
Q. And what did you say then?

[fol. 139] A. I told him I would meet him at eleven o'clock.

Q. And did you see him?
A. I did so.
Q. What happened then?
A. He gave me the package, and I walked to Eighth Avenue, and he walked in front of me.
Q. And then what happened?

A. I walked into the men's room on the ship and I gave it to him.

Q. On the ship?

A. I mean in the bar.

Q. And you gave him the package?

A. That's right.

Q. Did you have any conversation at that time?

A. He said he would see me later.

Q. And did you see him later?

A. I did so.

Q. And what happened then?

A. I was on the gangplank and he gave me some money.

Q. Did there come a time thereafter when you saw him again?

A. Yes. About six weeks later.

Q. Was it another Grace Line ship at that time?

A. That's right.

[fol. 140] Q. And what was the conversation you had with him?

A. Well, I met him in the hallway, and he said he had another package he wanted me to take off, and I told him I would meet him around about 9:30.

Q. And did you meet him?

A. I did.

Q. What happened then?

A. He gave me the package and I walked to the same bar and he was behind me.

Q. What happened at the bar?

A. I gave him the package and he kept going. What was in it, I don't know.

Q. Did you have a conversation with him at that time?

A. I didn't.

Q. Was there any talk about payment?

A. Oh, he told me he would see me later on the ship.

Q. Did you see him later?

A. I did.

Q. What happened then?

A. He gave me some money but how much I don't remember.

Q. Now, did there come a time thereafter, Mr. Barber, when you met a man by the name of Jesse Colson?

[fol. 141] Q. Who introduced you to him?

A. Sonny.
Q. Who do you mean by Sonny?
A. Winston.
Q. Winston Massiah?
A. That's right.
Q. Where did he introduce you to him?
A. In the sleeping quarters on the ship.
Q. What was the conversation at the time?
A. He told me—he said that I was a friend of his and I was O.K.
Q. Was there anything else said?
A. Colson told me to wait and he had a package for me to take off the ship, and I waited in the room, and he went and got it, and he brought it to me and I take it off the ship.
Q. What did you do with it then?
A. I went down in the subway and gave it to him on the subway.
Q. Who did you give it to?
A. To Jesse. To Jesse Massiah.
Q. You gave it to whom?
A. To Jesse.

The Court: Jesse who?
[fol. 142] The Witness: Colson.

Q. Did there come a time thereafter when you carried off a package and didn't get paid?

Mr. Carluccio: Objection, your Honor.
The Court: Don't lead the witness.
Mr. Starkey: I am sorry, your Honor.
The Court: Did this come to an end? Did this arrangement come to an end?
The Witness: Yes.
The Court: Tell the jury how it came to an end.
The Witness: On what occasion?
The Court: Did you stop carrying packages off the ship?
The Witness: I did so at that time but——
Mr. Starkey: Your Honor, if I may put this question:

Q. Did there come a time when it ended in so far as Winston Massiah was concerned?
A. Yes.

Q. Will you tell the Court what happened at that occasion and right before it?

A. Well, I——

Mr. Pogoda: May I at this time ask Mr. Starkey through your Honor, whether this is under the conspiracy count [fols. 143-144] or under the Counts 1 and 2?

The Court: What is it, Mr. Starkey?

Mr. Starkey: This would be, I think, admissible only under the conspiracy count, your Honor.

The Court: Let us proceed.

Tell us what happened.

The Witness: At what occasion now?

Q. The last time you carried off a package for Winston.

A. No, I never take anything else off for him.

Q. What happened on the last occasion?

A. Which occasion are you speaking about now?

Q. The last occasion on which you carried off for Winston Massiah.

A. Well, I didn't get any money.

Q. Well, how did that happen? You tell that to the Court and jury.

* * * * * * *

[fol. 145] The Witness: Well, I only said I took the package off and I didn't get paid. That's all I can say.

Q. When did you first talk to him on this occasion about carrying the package off?

Mr. Somers: Talk to whom?

The Witness: Where did I first talk to him at?

Mr. Pogoda: To which defendant?

Q. The question was with reference to your breaking off with Massiah. That was the question. Now, you said that you didn't get any money the last time you took the package off. Now, we want to know all about that. Tell us where it was, and what happened, what he said to you and what you said to him.

A. Well, I just said that I brought the package off and he said that I would see him at his house.

Q. From where did you carry the package?
A. To Eighth Avenue, in the bar.
[fol. 146] Q. And where did you start?
A. From aft of the No. 5 hatch.
Q. On the ship?
A. Yes.
Q. And you had a conversation with him at that time?
A. Not too much.
Q. Well, yes, but what was the conversation?
A. He asked me would I take the package off of the ship.
Q. Yes. And what did you say?
A. I said yes.
Q. O.K. Now, did there come a time then when you did?
A. That was the time then.
Q. What did you do with the package?
A. I gave it to him on Eighth Avenue in a bar.
Q. What did he say to you at that time?
A. He said he would see me later at his house.
Q. And did you see him later?
A. I did so.
Q. How much later?
A. The following Saturday.
Q. Did you have a conversation with him then?
[fols. 147-151] A. (No answer.)
Q. At his house?
A. Well, I only stayed there about five minutes.
Q. The question, Mr. Barber, was did you have a conversation with him?

The Court: What did he say? Tell us what happened at the house.

The Witness: He only told me, he said he didn't have any money because he was stuck up, and I only stayed there about five minutes and I walks out.

* * * * * * *

[fol. 152] June 16, 1961, 10:30 a.m.

Redirect examination.

By Mr. Starkey:

Q. Now, Mr. Barber, at the time that we recessed yesterday you were telling the Court and the jury about the conversation you had with Winston Massiah at his home. Do you recall that?

A. Yes.

Q. When did that take place?

A. In 1956.

Q. Do you recall when in '56?

A. In the spring of the year.

Q. At his home?

A. At his home? Yes, at his home.

[fol. 153] Q. When did you meet Winston Massiah?

A. 1956.

Q. When?

A. On the ship.

Q. When in '56?

A. In the spring of the year.

Q. Now when did you see him at his home?

A. On a Saturday at noontime.

Q. And what was the conversation you had with him at that time?

A. Well, he just told me that he didn't have any money, that the cocaine was taken away from him.

Q. That the what was taken away from him?

A. The cocaine.

Q. Did he say anything else?

A. Jesse walks in and he said like "I don't believe it" and I only stayed there a few minutes and I left.

Q. Did Jesse say anything when Winston said you didn't believe it?

A. He said, "Yes, that's true."

Q. What did he say was true?

A. That the cocaine was taken away from him.

Q. Now, when did that happen?

A. In 1956.

[fols. 154-295] Q. What part of '56?

A. I would say as near as I can remember the spring of the year.

Q. You mean it happened at the same time you met Winston Massiah?

A. No. It happened six months later.

Q. Six months after you met him?

A. That's right.

Q. Well, then, that wouldn't be in the spring, would it?

A. That would be in the spring. I said that is the best I could remember it was in the spring.

Q. I mean if it happened six months after you met him.

A. That would be in the fall.

Q. Now, you testified that you had carried packages off for Jesse Colson.

A. That's right.

Q. How many times did you do that?

A. Only twice.

Q. When was the first time you carried off for him?

A. Three months later, after I met Winston.

Q. And that was when you met Jesse?

A. That is when I met Jesse.

* * * * * * *

[fol. 296] PAUL KING, called as a witness by the government, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Starkey:

Q. What is your occupation, sir?

A. Merchant seaman.

Q. How long have you been a seaman?

A. Ever since I have been 15 years old.

Q. Do you know Jesse Colson?

A. Yes, I did.

Q. When did you first meet him?

A. I met him in 1946 in Odessa, Russia.

Q. Did there come a time thereafter when you renewed your acquaintance with him in 1958?

A. Yes, sir.

Q. Did there come a time in 1958 when you sailed on the Santa Maria of the Grace Lines?

A. Yes, sir.

Q. Do you recall when it was that you sailed on that occasion, Mr. King?

A. It was February. I joined the ship on February 26th.

Q. And how long after that did you sail?

A. It was March 1st.

Q. Did there come a time, after you signed on, that you [fol. 297] had a conversation with Jesse Colson?

A. Yes, sir.

Q. Where did that conversation take place?

A. At his home.

Q. What did he say to you and what did you say to him at that time?

Mr. Pogoda: If the Court pleases, I assume this is with reference to count 8 of the indictment.

The Court: This is with reference to the conspiracy count, I think.

Mr. Starkey: That's correct, your Honor.

The Court: All right. What did you say to him and what did he say to you at that time?

A. He asked me, since I was going down to South America, would I pick up a package of paint solids for him. And I agreed to do so.

And was anything else said at that time?

A. Well, he gave me a letter to give to people in South America. It was written in Spanish, and so the address was that of people in South America.

Q. Where in South America?

A. Chile.

Q. What city?

A. Valparaiso.

[fol. 298] Mr. Carluccio: Your Honor, what date is this that he is speaking about?

The Court: Did you give him a date?

Mr. Starkey: Your Honor, I believe the witness testified that it was between signing on on February 26th and the time of sailing on March 1st.

Q. Did he give you anything else besides the letter?

A. I believe it was part of a playing card. He said that he would send half the playing card down there and I should keep the other half.

Q. What were you to do with the other half?

A. I was supposed to present it to the fellow who had the paint solids.

Q. And you sailed on March 1st?

A. March 1st.

Q. What did you do when you arrived in Valparaiso?

A. Well, I still had this letter in my suit coat pocket and I practically forgot all about it, and so I was out in the streets for the first time I was in Valparaiso so I was looking over the town and I happened to run my hand in my coat pocket and I came up with this letter. So I caught a cab and went to this address.

Q. And what happened when you got there?

A. Well, I knocked on the door and a woman answered [fol 299] the door, and she asked me what did I want. So I presented her with the letter. And she asked me would I come in and I came in and she told me to sit down and then a fellow came out, and he looked at the letter and told me to wait. So I did so.

Q. What happened thereafter?

A. Well, about three-quarters of an hour or a half hour, within that period of time, he came back out with a package, and he gave me the package and said thank you. So I took the package and left.

Q. What did you do with the package?

A. Well, I stuck it in my coat pocket and went on around the city looking at the city, and then when I reached back to the ship I just took it and threw it in my locker.

Q. Now, on the way back to New York did there come a time when you received a letter?

A. Yes. Jesse wrote me a letter. I received it in Callao, Peru.

Q. Did you ever discuss that letter thereafter with Jesse?

A. No, I don't believe so.

Q. How do you know it was from Jesse? Did you recognize his handwriting?

A. Yes, I did.

[fol. 300] Q. Now, do you still have that letter?

A. No, sir, I don't.

Q. What did you do with it?

A. I imagine I destroyed it, threw it away, like I do most all my letters.

Q. Do you recall what he said in the letter?

A. Well, it was mostly small talk. In the letter he said that if anyone should ask what happened to the paint solids besides him to tell them that I misplaced it or I threw it away or lost it, or something like that.

Q. Now, do you recall when you arrived back in New York?

A. It was April 7th, I believe.

Q. Do you recall whether in the letter he mentioned anybody else?

A. He mentioned, I believe, a fellow by the name of Duke.

Q. What did he say about Duke?

A. He said if Duke should ask me what happened to the paint solids, to tell him that I lost it.

Q. Do you know who Duke it?

A. He was a friend of Jesse's, or is a friend of Jesse's.

Q. When did Jesse introduce you to him?

[fol. 301] A. I met Duke some time before I caught the ship.

Q. Do you recall what Jesse said when he introduced you to him?

A. No, I don't.

Q. Do you know Duke's real name to be Mitchell Anfield?

A. No, I don't.

Q. Do you see Duke in the courtroom?

(A pause)

A. No, I don't believe so.

Q. Do you want to get off the stand and come down and look?

(A pause).

A. I believe that is him over there.

Q. What kind of clothes is he wearing?

A. He is wearing a brown sport coat, I believe, a checkered sport coat.

Q. Will you go down next to the man and look at him, please?

A. I don't even see him. I don't remember him. In the pink shirt.

Q. Will you return to the witness stand, please.

Mr. Starkey: Let the record show that the witness identified the defendant Anfield.

[fol. 302] A. It's been a long time since I saw him.

Q. Now when you returned to New York do you recall when you arrived?

A. It was April 7th, I believe.

Q. What happened when you arrived in New York?

A. When I arrived in New York Jesse and Duke meet me when I was coming off the ship. They were waiting outside the gate. So Jesse greeted me and they started talking. So he asked me what did I do with the package, the paint solids, and I then recalled the letter, and told him that I lost it.

Q. The paint solids?

A. The paint solids.

Q. What was said then?

A. Well, there was some discussion of how I lost it, or why did I lose it, or something like that.

Q. Who discussed it? Who said what?

A. Well, the discussion was between Duke and Jesse.

Q. And what was said to the best of your recollection?

A. Gee, it's been a long time. I can't exactly tell you exactly what was said.

Q. Did you have any conversation, you, yourself, with [fol. 303] Duke, or he with you?

A. Well, the conversation was mixed up between three.

Q. Do you recall anything Duke said to you?

A. No, not offhand.

Q. Where did you go from the pier?

A. We went uptown and went to a couple of bars and had a few drinks, and then they took me home.

Q. Was there any conversation before they dropped you off?

A. Well, there was conversation back and forth about different things, and about the paint solids also.

Q. Was there any more said about them?

A. Well, I don't exactly remember what was said but there was some discussion of it.

Q. Well, what did you do thereafter?

A. Well, I went home and Jesse asked me did he want me—did he want for me to pick him up, or did he want—let me get this straight. Did he want him to pick me up in the morning.

Q. To do what?

A. To take me back down to the ship.

Q. What did you say?

A. I agreed, yes.

[fol. 304] Q. Was there any further discussion with him about the package after Duke was gone?

A. No.

Q. Then the following morning did there come a time when he did pick you up?

A. Yes, he did.

Q. Was he alone?

A. No, he was with another fellow called Icky.

Q. Do you see Icky in the courtroom?

A. No, I don't remember him. I only saw him once.

Q. But you remember the name Icky?

A. Yes.

Q. What happened after Jesse and Icky picked you up?

A. They took me down to the pier, and I was a little late, so I wanted to go right in as soon as I possibly could, so they stopped to get some coffee, and it was at this little restaurant, so I went right in, and I was informed when I went aboard the ship that it was my day off, because it was a policy of Grace Line at the time that one man would get—half the crew would get a day off in each port, I meant home port.

So after I found out that I had the time off, I said, well, rather than have them come on the ship, pick up the package and talk and fool around on the ship, I would rather [fols. 305-538] get off the ship right there and then and go back home. So I picked up the package and walked out off the ship with it.

Q. And then what did you do with it?

A. Well, I walked out the gate with the package, and I handed it to Jesse.

Q. Was there any conversation at that time?

A. Yes, there was. He said I was a darn fool for bringing the package out. I asked him why. He said because I could have gotten myself in a lot of trouble. I said, "What kind of trouble. It's paint solids." He said, "You still shouldn't have took the package off. I didn't want you to bring it off." I told him, "Well, why is it you didn't want me to take the package off?" He says "Because it is narcotics," and I got pretty warm at him because I seen my seaman's going, my job and everything else.

Q. You got what at him?

A. I got pretty peeved, I got angry at him.

Q. Did you tell him so?

A. Absolutely.

Mr. Starkey: No further questions.

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[fols. 539-548] June 20, 1961, 19:30 a.m.

BARNEY L. FINK, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Starkey:

Q. What is your occupation, Mr. Fink?

A. I am a commercial manager, local commercial manager for the New York Telephone Company.

Q. Local for what district and what area?

A. I handle several different exchanges and included is the Lorraine 2 exchange.

Q. And what are your duties?

A. Handling—well, complaints, orders, collections, and maintenance of records.

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[fol. 549] Q. I ask you to read from the documents to the jury the date of the telephone call, the point of origin, the point of destination, and the person who was called.

A. The call was originated on February 20, 1958. The

call was made from a coin telephone, RIV 9-9767, by a party representing himself to be Jesse Colson and he asked that the charges be made to LOrraine 2-8373. The call was sent to Valparaiso, Chile. The number called was 6085, and the particular person requested was—I believe it is Rene Huasaff. It looks like an "F".

Q. Will you read also from those records to the jury and the court, Mr. Fink, if the entry appears there, who the subscriber of that LOrraine number was at that [fols. 550-553] time?

A. Yes. Mr. Jesse Colson was the subscriber at that time.

* * * * * * *

[fols. 554-578] June 20, 1961.

LEON ELLIS, called as a witness on behalf of the government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Starkey:

* * * * * * *

[fol. 579] Q. Did there come a time the following summer when you talked to Jesse on the telephone?

A. Yes.

Q. How closely can you fix the date?

A. It was either late May or early June. That is the closest I can fix it.

Q. And what was said on that occasion?

A. He asked me that he wanted to make a telephone call out of the country, and he wanted to know could I find somebody that he could use the phone because he couldn't use his and because he was tapped.

Mr. Carluccio: What year?

The Court: Tell us the year.

The Witness: '58. 1958.

The Court: And the date, as close as you can remember it?

[fol. 580] The Witness: It was either late May or early June.

The Court: All right, take the witness.

By Mr. Starkey:

Q. And what was it that he said?

A. That his telephone was tapped and he couldn't make any calls on it out of the country.

Q. And what did you do?

A. I asked my godmother about letting Jesse make a long-distance call on the telephone, and she said "Yes, okay," as long as they will pay the bill it would be all right.

And I said, "Okay."

So then I got Jesse the following day, the next day, or a couple of days later, and he made the telephone call to Chile.

Q. Did you hear any part of the conversation?

A. I heard it, but he was speaking in Spanish, so I didn't understand it.

Q. Did there come a time thereafter, when he talked to you, when he talked to you about a delivery?

A. Yes.

Q. When was that?

A. That was around the first or second week in [fol. 581] September.

Q. Where did the conversation take place?

A. We was either in his car or in Carter's Corner.

Q. That is a bar—Carter's Corner?

A. Yes.

Q. What did he say to you?

A. He told me that he was expecting a shipment in, and he wasn't going to call me no more until the date the people was going to arrive, and when I get the telephone, just tell him "Hello" and "How do you feel?" and hang up, and get a cab and come straight on up to his house.

Q. Was there any conversation about where the people would be coming from?

A. No. Well, I know where they was coming from. I know they was coming in from Chile.

Mr. Somers: Your Honor, I move to strike that out, sir.

The Court: How did you know that?

The Witness: Because from the telephone bill, that that is where he was calling the people.

The Court: How do you know that the telephone call to [fols. 582-604] Chile had any connection with the package?

The Witness: Well, he was telling me all the time that is what the call was for.

The Court: Colson was telling you that?

The Witness: Yes.

The Court: Overruled.

* * * * * * *

[fol. 605] Q. Did you have any conversation thereafter with Jesse Colson about the quality of the cocaine?

A. Yes.

Q. What was said?

[fols. 606-649] A. He told me that he was getting complaints by everybody that got the coke, and a lot of people was giving it back to him, and he said it wasn't nothing but garbage, you know. And he made a call to Chile, so he told me, and he told them to send him part of his money back or send him some more cocaine that is pure, because he is not going to lose all of his money on this deal.

* * * * * * *

[fol. 650] William John McNamara, called as a witness on behalf of the government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Starkey:

Q. What is your occupation, Mr. McNamara?

A. United States Customs Enforcement Officer.

Q. How long have you been so employed?

A. 17 years.

Q. Were you on duty on May 6, 1958?

A. Yes.

Q. What was your assignment on that date?

A. On that day I was assigned to the after section part of the S/S Santa Maria with a partner, Edward Adams.

Q. And what was your assignment at that time? What were you supposed to be doing?

A. To be searching the ship.

Q. Did you do so?

[fol. 651] A. Yes, sir.

Q. What part of the ship did you search?

A. The aft peak.

Q. Did you find anything in the aft peak that was not part of the ship's equipment?

A. Yes. After moving some rope and some cargo nets I came across five packages.

Q. What was their appearance?

A. About three and a half inches by about eight inches, white packages, and they were partially covered by a blue cloth.

Mr. Starkey: I ask that these two items be marked for identification as Government's Exhibits 12 and 13.

(Government's Exhibits 12 and 13 marked for identification.)

Q. Now I show you Government's Exhibits 12 and 13 for identification, sir, and ask you if you recognize either or both.

A. Yes, sir, I recognize this one, sir.

Q. Where and when have you seen that before?

A. On the Santa Maria. It was partially covering these five packages.

[fols. 652-670] Q. Now, I show you the contents of this bag marked Government's Exhibit 8 for identification, and ask you if you recognize them.

A. Yes.

Q. Where and when have you seen them before?

A. On the Santa Maria.

Q. What were the circumstances?

A. Well, they were on—after I had moved this rope these were laying forward inside of the plastic bag and one was laying outside of it.

Q. Were they in the same condition that they are now?
A. No.
Q. How were they different?
A. Well, they had powder in them.

* * * * * * *

[fol. 671] EDWARD ADAMS, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Starkey:

Q. Your occupation, sir?
A. Customs Enforcement Officer, sir.
Q. How long have you been so employed?
A. 15 years, sir.
Q. Were you on duty on May 6, 1958?
A. Yes, sir, I was.
Q. What was your assignment on that date?
A. I was assigned as a customs searcher, assigned to the Santa Maria on Pier 57, North River.
Q. With whom did you work on that date?
A. With Officer McNamara.
Q. Now, I show you, sir, Government's Exhibit 13 for identification, and ask you if you recognize that.
A. It looks like something I marked. Yes, sir, this is it.
[fol. 672] Q. Where and when have you seen it before?
A. On the date you mentioned, sir.
Q. May 6th?
A. That's right, sir.
Q. Where?
A. This cloth covered a package which I found back aft on the Santa Maria.
Q. I show you Government's Exhibit 10 for identification and ask you if you recognize that.

(No response.)

Q. You may take it out of the plastic case if you need to, sir.

A. Yes, sir, this is a part of that package, sir. This is my identification on there.

Q. A package which Government's Exhibit 13 for identification covered?

A. Yes, sir.

Q. Now, after you made this discovery, Mr. Adams, what you do?

A. I notified the inspector in charge.

Q. Who was that?

A. Inspector Levkulic.

Q. Did there come a time when you gave Government's [fols. 673-747] Exhibit 10 for identification to Inspector Levkulic?

A. Yes, sir, we left it there where we found it, and Inspector Levkulic came and picked it up and brought it back to headquarters aboard ship.

Q. And did there come a time—and was it in the same condition then as it is now, or did it have something in it?

A. There was contents of white powder in there, sir.

* * * * * * *

[fol. 748] JOSEPH DE VITO, called as a witness, having been first duly sworn, testified as follows:

* * * * * * *

[fol. 749] Direct examination.

By Mr. Starkey:

Q. What is your occupation, Mr. De Vito?

A. Customs marine officer.

Q. What are your duties, sir?

A. I effect the formal entrance and clearance of vessels in the foreign trade.

Q. Are you familiar with ship manifests, and the method of keeping ship manifest records?

A. Yes.

Q. Is that part of your duties?

A. Yes, sir.

Q. I show you Government's Exhibit 23 for identification and ask if you recognize that document?

A. Yes, I do. This is the vessel's inward manifest.

Q. What vessel, and can you tell the jury—well, what vessel was covered?

A. This is the American steamship Santa Maria.

Q. It is the manifest for what voyage?

A. For the foreign voyage.

Q. When did it leave and when did it return?

A. Well, to leave I wouldn't know the exact date. This [fol. 750] is arrival. I haven't got that information with me but it can be available.

Q. What is the arrival date?

A. The arrival date is on May 7, 1958.

Q. Did it arrive May 7th or were those records cleared on May 7th?

A. She was entered, formally entered on May 7th. Her actual arrival off quarantine is 1:05 p.m. of May 6, 1958.

Q. Is that manifest kept in the regular course of the business of your office?

A. Yes, sir.

Q. And was it the regular course of business at or about the time of the arrival of this vessel on this particular voyage, to prepare and keep such a record?

A. Yes, sir.

Mr. Starkey: I will offer this *this* manifest, your Honor.

The Court: You might explain to counsel what the purpose of this is. You don't have to do it in front of the jury.

(Discussion off the record outside the hearing of the jury.)

Mr. Somers: No objection.

[fol. 751] (Government's Exhibit 23 for identification received in evidence.)

Mr. Starkey: I would like to ask the witness several further questions insofar as the contents of the record is concerned, your Honor.

By Mr. Starkey:

Q. Mr. De Vito, do you know what a vessel of the United States is?

A. Any vessel documented under the laws of the United States.

Q. The United States Registry?

A. The United States Registry.

Q. Does that manifest show whether or not this vessel, the Santa Maria, is of United States Registry?

A. Yes, sir, it does. It was registered at New York on January 5, 1950.

Q. Does that vessel show whether or not it was engaged in a foreign voyage at this time?

A. Yes, sir.

Q. Was it a foreign voyage?

A. It engages in foreign voyages.

Q. Do you see three pounds eight ounces 256 grains of cocaine or for that matter any amount of cocaine manifested or listed as part of the ship's stores?

[fol. 752] Mr. Somers: I will object to that, your Honor. This apparently is predicated upon an expectation of a negative answer. I strongly object to that, your Honor.

The Court: On what ground?

Mr. Somers: On the ground that this is improper, simply improper.

The Court: Why?

Mr. Somers: Because this man is putting—the examiner is putting into the mouth of the witness, by this indirection, testimony that he never could get in otherwise. He is going to say no. He might just as well say 27 pounds of narcotics, is that on the manifest. The man will say no. But look how inflammatory that is to a jury, your Honor.

The Court: Well, how do you suggest that is be handled, sir?

Mr. Somers: He shouldn't say it. What does appear on that manifest. Let him read it. The jury can deduce from that whether or not this contraband was ever on that manifest.

The Court: That manifest has possibly hundreds of articles.

Mr. Somers: Well, that's the only way to do it. [fol. 753] Certainly not like this.

The Court: That is overruled. Answer the question.

Did you study that manifest yourself, sir?

The Witness: Yes, sir.

The Court: Did you go through it all?

The Witness: Just now, no.

The Court: Did you ever go through it?

The Witness: Yes, I have.

The Court Did you go through it, after being instructed to look on the manifest and see whether or not there was any cocaine manifested?

The Witness: After being instructed, yes.

The Court: You did?

The Witness: Yes.

The Court: Did you go through the whole manifest, article by article?

The Witness: Not article by article.

The Court: Well, how did you go through it?

The Witness: Through the store list where it was originally supposed to be manifested. Ordinarily they don't manifest in the cargo section of any narcotics.

Mr. Starkey: I think your Honor by one or two questions I can clear the matter up.

[fol. 754] Q. Is there one list of ship's stores?

A. That's right.

Q. Is any cocaine listed on the ship's stores?

A. As far as I could see, none.

Q. Well, have you looked?

A. I have looked. I just glanced a few minutes ago down in there and there is none here. There is narcotics but no cocaine as far as I can see here.

Q. In the ship's stores there are some narcotics?

A. Some, yes.

Q. Among them is there any cocaine?

A. No.

Q. What are the narcotics?

A. Well, like morphine, morphine sulfur, and cocaine, but of course that is a medicine, more or less, but that is about all. As far as I know of narcotics, I don't know too much of narcotics.

Q. There is a listing there, is there not, giving the narcotics and the ship's stores?

A. That's right.

Q. There is no cocaine in that listing?

A. None. None listed.

Q. Now, will you look at the manifest and insofar as [fols. 755-1126] you have examined it there is no cocaine manifested?

A. Yes, sir.

Q. Have you looked at the discrepancy sheet? Do you know what a discrepancy sheet is?

A. Yes, sir.

Q. What is a discrepancy sheet?

A. A discrepancy sheet is stuff that is manifested but not found. That is stuff that is not manifest or manifest but not found. That is the discrepancy sheet. As articles that are noted on here that were not found or was manifested and not found.

Q. And will you read to the jury what was found but not manifested on this voyage, according to the discrepancy sheet.

A. Manifest but not found—

Q. No, found but not manifest, sir.

A. Found but not manifested. Well, according to this there is one box of engine parts, four cases of machinery, five packages of powder containing narcotics, and two packages of powder containing narcotics.

Mr. Starkey: No further questions.

* * * * * * *

[fol. 1127] FRANK TORRES, called as a witness by the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Starkey:

Q. Do you know Jesse Colson, Mr. Torres?

A. Yes, I do.

Q. First, have you ever been convicted of a crime?

A. Yes.
Q. How many times?
A. Twice.
Q. When and for what crimes?
A. 1951 and 1952.

The Court: Keep your voice up, please.

A. 1951 on a marihuana charge, and in 1952 for possession of heroin.

Q. Now, I refer you to August of '57 and ask you if there came a time in that month when you saw Jesse Colson?

A. Yes. I took the ship Santa Maria in August '57. I met him in the company offices.

Q. Do you know what part of August it was?

A. In the doctor's office.

Q. What part of the month of August, do you recall?

[fol. 1128] A. August 27 or 28.

Q. And you saw him in the doctor's office?

A. Yes.

Q. Where was that?

A. That is in the Grace Line pier.

Q. Did you have a conversation with him?

A. Yes.

Q. What did he say and what did you say?

A. He said he was taking a trip off, that I should wait for him until he got back on because he had a connection of cocaine.

Q. Did he say where?

A. No, not at the time, no.

Q. What did you say?

A. I said I would wait until he got back on again.

Q. Was there any conversation about when that would be?

A. At the end of the trip.

Q. How long does a trip take?

A. 38 days.

Q. Do you know Winston Massiah?

A. Yes.

[fol. 1129] Q. Do you see him in the courtroom?

A. Yes.

Q. Will you point him out, please.
The Court: Tell us where he is sitting.

A. Right behind the DA on the right.

Mr. Starkey: May the record now show, your Honor, that he has identified the defendant Massiah?
The Court: All right, proceed.

Q. When did you first see Massiah?
A. On board the ship.
Q. On this voyage?
A. Yes.
Q. When did the ship get back?
A. October 8.
Q. Did there come a time thereafter when you saw Colson again?
A. Yes.
Q. Where?
A. When we got back from the trip on the ship.
Q. He came aboard the ship?
A. Yes, sir.
Q. Did you have a conversation with him?
A. Yes.
Q. What did he say and what did you say?
[fol. 1130] A. I told him I was getting off the ship.
He told me if I wanted to invest the money I had, give it to him so he could invest it for me.
Q. What did you say?
A. I told him no.
Q. Was there any further conversation?
A. Well, he told me that I should wait until the next trip when the ship got back, that he had a man bringing some stuff for him.
No, excuse me. He said to wait until he got back.
Q. Until he got back?
A. Until he got back and we could talk business then.
Q. What kind of business?
A. The cocaine business.
Q. Did you talk to anyone about this conversation with Jesse Colson?
A. Yes.
Q. Who was that?

A. A friend of mine.

Q. Did there come a time when you and that friend again saw Colson?

A. Yes.

[fol. 1131] Q. When was that?

A. The date I can't recall very well.

Mr. Carluccio: Your Honor, at this point could he kindly say the friend's name, the place, and he doesn't know the time, but if he has the friend's name and the place of this conversation, I would like to have it.

The Court: Suppose you tell us the friend's name and the place.

The Witness: Jimmy Torrens..

Q. Mr. Torres, I show you Government's Exhibit 21, the next to the last page, and I ask you to look at that and see if that refreshes your recollection as to when you next saw Jesse Colson.

Mr. Carluccio: Objection. Completely leading, your Honor. I don't think he could give him the information and tell him to pick out when he next saw Jesse Colson.

The Court: That is overruled. I think it is proper direct examination.

Let the record show that this exhibit shows the sailings of this witness on the Santa Maria.

Is that what it shows?

The Witness: Yes.

[fol. 1132] The Court: Is it your sailings or Colson's sailings?

The Witness. Colson's

The Court: All right. Yes.

The Witness: Yes, I see it. November 18.

Q. Of what year?

A. Of '57.

Q. Where did you see Colson on that day?

A. On the ship.

Q. Who was present?

A. Only me, only us.

Q. Who?

A. Colson and me.

Q. Where was Torrens?
A. He was in the messroom.
Q. Did you have a conversation with Colson?
A. Yes.
Q. What was said on this occasion?
A. That he had brought a load, that I should call him up that same night at his house.
Q. Did you see anybody else you knew aboard the ship at this time?
A. No.
Q. Did there come a time when you did go up to his house?
[fol. 1133] A. Yes.
Q. When was that?
A. The same day.
Q. With whom did you go up there?
A. Beg your pardon?
Q. With whom did you go there, with anyone?
A. With Torrens.
Q. You had a conversation with Colson at that time?
A. Yes.
Q. What was said on that occasion?
A. He had some samples which I tasted.
Q. Samples of what?
A. Cocaine.
Q. How did it taste?
A. Bitter.
Q. What was said?
A. He said it would cost us 500 cash and 600 if credit.
Q. 500 in cash and 600 if credit?
A. Yes.
Q. What did you say?
A. I told him I only had 300, and I would pay him the 300 later on.
[fol. 1134] Q. Did he make delivery at that time?
A. The day after.
Q. Do you know why he didn't make delivery at that time?
A. He didn't have it in his house, I guess.
Q. Where did he make delivery?
A. The day after.

Q. Where?
A. In my house.
Q. What did he give you?
A. An ounce.
Q. Is that scale weight?
A. No. 16 spoons.
Q. Are you familiar with the appearance of cocaine?
A. Yes.
Q. What does it look like?
A. Sugar or salt.
Q. And have you used cocaine?
A. Yes.
Q. On about how many occasions, would you say?
A. Quite a number of occasions.
Q. When did you begin?
[fol. 1135] A. About 1950.
Q. How did you use it when you used it, needle or snort?
A. Snort.
Q. Just snort?
A. Yes.
Q. You are familiar with the effect of cocaine upon you when you use it?
A. Yes.
Q. Did you use any of this? Did you use any of this delivery of Colson's?
A. Yes.
Q. Do you know whether or not it was cocaine?
A. It was.
Q. Now, did there come a time thereafter when you again talked to him about cocaine?
A. That was the end of December. No. I saw him again a week after that.
Q. What happened on that occasion?
A. I took a quarter of an ounce.
Q. Where?
A. In his house.
Q. How much did you pay for it?
A. $125.
[fol. 1136] Did you use any of that?
A. Yes.

Q. Do you know whether or not it was cocaine?
A. It was.
Q. Did you see Colson thereafter?
A. Yes. I saw him again but it was a week after I saw him and he had no more.
Q. What did he say?
A. He said he was waiting for another shipment that a friend of his was going to bring over.
Q. Now, did there come a time when you again met the Santa Maria?
A. Yes.
Q. When was that?
A. The end of the year. Late December.
Q. What happened? Did you go aboard?
A. Yes.
Q. What happened when you went aboard?
A. I was approached by Winston.
Q. Massiah?
A. Massiah.
Q. What was said?
A. He asked me how many pieces did I want. I told [fols. 1137-1228] him I didn't know what he was talking about.
Q. How many what?
A. How many ounces.
Q. Yes?
A. I told him I didn't know what he was talking about.

Then he said Colson had informed him what was going on between us.

* * * * * * *

[fol. 1229] June 23, 1961.

Cross-examination.

By Mr. Carluccio.

The Court: Did you tell the City, Federal or State agents, after your arrest in April 1958, about the landing of cocaine from the Santa Maria, and about the activity on the Santa Maria with reference to cocaine?

The Witness: Yes.
The Court: You told them all about that?
The Witness: Yes.
[fol. 1230] The Court: Whom did you tell, the City, State or Federal agents?
The Witness: The Federal agents.
The Court: You told the Federal agents about that?
The Witness: Yes.

By Mr. Carluccio:

Q. And you also told the City agents?
A. I don't recall.
Q. But you might have told the City agents?
A. I don't recall.
Q. You haven't been indicted or arrested—you haven't been indicted with reference to that importation on May 6th?

Mr. Starkey: Objection.
The Court: Well, the answer to that is he has not. So let's proceed. It is a matter of record.

Q. When you had told the Federal Agents about this importation on May 6 you had not only told them the ship, but you had also told them exactly where it would be found, is that so, on the ship?
A. More or less.
Q. Yes?
[fols. 1231-1262] A. More or less.
Q. Did you tell them it would be in the stern of the vessel placed under a tarpaulin?

Mr. Starkey: Your Honor, again I object. This is no way impeaches the witness' direct or cross, anything that he said on the stand.
The Court: That is overruled. Did you tell them it was to be found in the stern of the vessel underneath the tarpaulin?
The Witness: I think I did, yes.
The Court: All right, proceed.

. . . . . .

[fol. 1263] WARDNER H. BARTLETT, called as a witness on behalf of the government, being first duly sworn, testified as follows:

Direct Examination.

By Mr. Starkey:

Q. What is your occupation, sir?

A. I work for the Treasury Department, Bureau of Customs.

Q. What is your title?

A. Supervisory Customs Enforcement Officer.

Q. How long have you been so employed?

A. I have been in this title one year.

Q. What are your duties as a customs enforcement officer?

A. I am in charge of the searching of vessels.

Q. I show you Government's Exhibit 25 for identification and ask you if you recognize these documents.

A. These documents here include declarations. Each crew member makes out a declaration of his imports.

Q. Are you familiar with the appearance of such records?

A. Yes, sir.

[fol. 1264] Q. How long have you been dealing with them?

A. Ten years.

Q. Are you familiar with the procedure of the execution, preparation and maintenance of those records?

A. Yes, sir.

Q. Do you know if they are prepared in the regular course of the operations of customs?

A. They are, sir.

Q. Is it the regular course on or about the entry of a specific ship for such documents to be made and kept by customs?

A. It is. It is part of the entry.

Mr. Starkey: I offer these documents, your Honor.

The Court: Let counsel see them.

While they are looking at them go on to something else.

Q. Were you on duty on May 6, 1958?

A. Yes, sir.

Q. What was your assignment on that date?

A. I was assigned in charge of the search of the Santa Maria.

Q. Did there come a time later on that day when you took any packages into your custody?

[fol. 1265] A. Yes, sir.

Q. How many packages did you receive?

A. On the first occasion I received five packages.

Q. From whom did you receive them?

A. From Mr. McNamara.

Q. Now I show you Government's Exhibit 8 for identification and ask if you recognize the contents.

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. Where and when have you seen them before?

A. On May 6 I saw them for the first time in the aft peak of the Santa Maria.

Q. Who called your attention to them?

A. Mr. McNamara.

Q. I show you Government's Exhibit 10 for identification and ask if you recognize those items?

A. Yes, sir, I do.

Q. Where and when have you seen that before?

A. I saw it on the same day, approximately 15 or 20 minutes after I saw the first packages.

Q. Was it Inspector Levkulic who gave you Government's Exhibit 10 for identification?

[fol. 1266] A. Yes, sir.

Q. Were these packages, Government's Exhibits 8 and 10 for identification in the same condition as they appear now in the courtroom or did they have something in them at the time?

A. They had a white powder in each one of the containers.

Q. Now I show you Government's Exhibits—I show you first of all Government's Exhibit 13 for identification and ask you if you recognize that cloth.

A. Yes, sir.

Q. Where and when have you seen that before?

A. I saw it on May 6, 1958. This cloth wrapped up—Adams' seizure.

Q. The packages which you were just shown?

A. Right. The last one. The two packages within one. The smallest of the two.

Mr. Carluccio: Will counsel mention the exhibit number of Adams' seizure?

Mr. Starkey: 11-A and B for identification.

Q. Government's Exhibit 13 for identification, was that in the same condition as you see it now?

A. Yes.

Q. Was it pulled apart, flat?

[fol. 1267] A. No.

Q. How was it?

A. It was wrapped around the packages, held by a piece of tape.

Q. How was it secured?

A. By a piece of tape, adhesive tape.

Mr. Starkey: I believe in regard to Adams' seizure this witness was only shown 10 for identification. 11-A and B are the contents.

Mr. Carluccio: For clarification of the record, is it that No. 13—it covered what exhibit?

Mr. Starkey: 10 for identification and 11-A and B.

Mr. Carluccio: That cloth, 13, covered 10, 11-A and 11-B, is that right?

Mr. Starkey: That's right.

Q. How was the rag secured?

A. By a piece of adhesive tape.

Q. Do you see the tape?

A. Yes, sir.

Q. Now, what did you do with the package which was secured with tape at that time after it was given to you?

A. When that was brought to my attention, I pulled [fol. 1268] the end of this cloth from the package and from the package I ripped a corner of it so that I could take a test of the contents.

Q. And did you take such a test?

A. I did, sir.

Q. What kind of a test was it?
A. We have a reagent, a marquis reagent.
Q. For what drug is that a test?
A. For opium or its derivatives.
Q. Including heroin?
A. Yes, sir.
Q. Do you know whether or not the marquis reagent reacts with cocaine?
A. It didn't sir.
Q. Do you know whether or not a marquis reagent does react with cocaine?
A. It will not with cocaine.
Q. So from that you learned that the contents were not heroin, is that right?
A. That's right, sir.

Mr. Starkey: May I have the Court's indulgence for one moment?
The Court: Yes.

(A pause.)

[fol. 1269] Q. Now, what did you do with the rag covering the blue rag which you have before you, Government's Exhibit 13 for identification?
A. That rag right there, sir?
Q. Yes.
A. What did I do?
Q. Well, at the point of the testimony you have reached it was still taped and secured.
A. Yes.
Q. What did you do then, did there come a time when you took it off?
A. There did, sir.
Q. Did you tear the tape at all when you took it off?
A. No, I just lifted the end of the tape. It wasn't ripped.
Q. Did there come a time——

Mr. Carluccio: I didn't hear that.

(Question and answer read.)

Q. And you took it off the package?
A. Yes, sir.

Q. Now, did you see any tax stamps on the package or on this at that time?

A. No, sir.

[fol. 1270] Q. Now I show you Government's Exhibit 12 for identification, and ask you if you recognize that rag.

A. I do, sir.

Q. Where and when have you seen that before?

A. I saw it on this same day, May 6, back aft, in the after peak, which partially covered Mr. McNamara's seizure.

Q. And those were the five packages?

A. Yes, sir.

Q. Which you have identified as Government's Exhibits 8 for identification?

A. Yes, sir.

Q. Did you take custody of that rag also?

A. I did, sir.

Q. Now, do you know whether or not these seizures were given numbers?

A. The seizure is given numbers.

Q. Do you know what the numbers were that were given to these seizures?

A. On these particular ones I don't know, but up in the upper right-hand corner on the tag on the seizure, the numbers come from the money and accounts division, they issue them.

[fols. 1271-1277] Q. Do you have any information with you?

A. I have some information with me.

Q. Will you check that?

A. If I may look at it, yes.

Q. You told me yesterday what the seizure number was, did you not, Inspector?

A. Right.

Mr. Pogoda: I didn't know the witness was on the stand yesterday.

Mr. Starkey: No. I am talking about in my office.

The Witness: McNamara's number was 22155. Adams' was 22156.

Q. All right, sir. Did there come a time, then, when you saw tax stamps on either Government's Exhibit 8 or Government's Exhibit 19 for identification, in these containers?

A. No, no tax stamps at all, sir.

Q. Did you see tax stamps on the outer covering, either rag, Government's Exhibits 13 and 12 for identification?

A. No, sir.

* * * * * * * *

[fols. 1278-1279] HELEN GARBUTT, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Starkey:

Q. What is your occupation, Miss Garbutt?

A. I am a chemist at the Customs laboratory.

* * * * * * * *

[fol. 1280] Q. Now I show you Government's Exhibits 10 and 8 for identification and ask if you recognize those exhibits.

A. Yes. These appear to be the wrappings that were around samples of white powder that I received that day.

Q. Did you mark them in any way?

A. Yes, my initials are on here.

Q. And that goes for each package?

A. Yes. They are all initialled.

[fols. 1281-1301] Q. You received them from Officers McNamara and Adams?

A. Yes. I did.

Q. Now, were they in that condition or did they have anything in them at the time?

A. Yes. They had white powder in them.

Q. What did you do with the powder?

A. I took it out and weighed it, and analyzed it and found that it was cocaine hydrochloride.

Q. What was the weight?

A. The contents of this package weighed one pound, one ounce and 40 grains, and the total contents of these packages were two pounds seven ounces, 216 grains.

Q. For a total of approximately three pounds eight ounces and 156 grains?

A. Yes.

* * * * * * *

[fol. 1302] MARIO COZZI, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Starkey:

Q. What is your occupation, Mr. Cozzi?

A. I am a customs agent employed by the Bureau of Customs, Treasury Department.

Q. How long have you been so employed?

A. As a customs agent, since 1953.

Q. Now, Agent Cozzi, were you on duty on May 6 of 1958?

A. Yes, sir.

Q. Did there come a time on that date when you boarded the S/S Santa Maria at Pier 57, North River?

A. Yes, sir.

Q. Where did you go after you boarded the ship?

[fol. 1303] A. I went up to the vicinity of a mess hall that was set up as a searching squad headquarters and met several customs officers there, and I also spoke to them about what went on aboard the ship.

Q. Now I show you Government's Exhibit 27 for identification and ask you if you recognize that item.

A. Yes, sir.

Q. Where and when had you seen it before?

A. I found that in a locker on board the S/S Santa Maria on the evening of May 6, 1958.

Q. Do you know whose locker it was?

A. Yes, sir. Winston Massiah, a seaman employed aboard that vessel.

Q. Did you have a conversation with Massiah about that tape?

A. Yes, sir.

Q. What did he say and what did you say?

A. After I found this tape I talked to Winston Massiah and I asked him if this was his tape. He stated that it was his tape.

I asked him what he used it for. He said—first I asked him where did he get it. He said he bought it in South America.

[fols. 1304-1308] And then I asked him "What did you use it for?" He said, "I sprained my left wrist."

Then I asked him, "Isn't it true that you used this to secure the packages of cocaine that were seized up here today?"

And he didn't make any reply to that last question.

* * * * * * *

[fols. 1309-1327] Cross-examination.

By Mr. Carluccio:

* * * * * * *

[fol. 1328] Q. I want to ask you about acknowledging that was his tape. That is the first question.

[fol. 1329] How did you show it to him when you said, "Is this your tape?" Did you show it to him just like that?

A. I showed him this thing, I says, "We found this in your locker. Is this your tape?"

He says, "Yes."

Q. And it was closed then, right, as you showed it to him?

A. I had it there for him.

Q. No. I am just asking you the question, did you show it the way you just showed it to the court?

A. I showed it to him closed and open before I left the vessel.

Q. The first time you showed it to him closed, right, as you just showed me now?

A. I showed it to him closed and open, sir.

Q. The first time?

(No response.)

Q. Or the first time you showed it closed?

A. I showed him the tape this way, because I was particularly interested in the width of this tape. I says, "Is this your tape?"

Q. That is the first time you showed it to him, the first time you showed it to him it was opened, is that your testimony, or was it the first——

[fols. 1330-1349] A. That is the best of my recollection, sir.

Q. And how long did you let him examine it?

A. I don't believe he took it in his hand. He looked at it and he says, "Yes, that is mine."

Q. Then what else did you ask him with reference to the tape?

A. I asked him where bought it. He said "I bought it in South America."

I said, "What did you buy it for?"

He said, "I sprained my left wrist." And he didn't have any tape on his left wrist.

I says, "If you sprained your left wrist how come you don't have any on?" So then I said, "What, are you kidding me? This is what you used to wrap the cocaine in."

Q. And he denied it?

A. He didn't answer.

* * * * * * * * *

[fol. 1350] FRANCIS R. LOGAN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Starkey:

Q. What is your occupation?
A. I am a textile technologist.
Q. How long have you been so employed?
A. 30 years.
Q. Who is your employer?
A. The U.S. Customs Laboratories.
Q. What do your duties entail?
A. Analyzing various textiles that are imported and sent up by the examiners to be analyzed in order to aid them in putting the proper duty on said textiles.
Q. What is your educational background for this position, sir?
A. I have a B.S. Degree in textile engineering.
Q. From what school?
A. Clemson College, South Carolina.
[fol. 1351] Q. Now I show you Government's Exhibit 27 for identification—rather, Government's Exhibit 27 in evidence, and ask you if you recognize that roll of tape.
A. Yes.
Q. Where and when have you seen it before?
A. Well, it was brought to the laboratory on May 12 of 1958.
Q. That was by Agent Murphy?
A. By Agent Murphy, yes.

Mr. Carluccio: Your Honor, at this point I wish to question the United States Attorney, that he should bring out further qualifications of this gentleman to examine tape and examine for this purpose, his statement on that voir dire or the qualification was he examines and analyzes for the purpose of customs. I don't know if the analysis of the tape was proper.

The Court: Suppose we wait until we get the question and then proceed.

Mr. Carluccio: Surely.

Q. Incidentally, how many of these analyses do you make a month, on the average, Mr. Logan?

A. You mean——

Q. Analyses of textiles.

[fol. 1352] A. Oh, textiles.

Q. Yes.

A. I would say 40 or 50, maybe, a month.

Q. All right, sir, now I show you Government's Exhibit 13 and ask you if you recognize that cloth and the tape thereon.

A. Yes, I do.

Q. Where and when have you seen that before?

A. At the same time the role of tape was shown to me.

Q. And Agent Murphy also delivered that?

A. Yes.

Q. Now, after you received the roll of tape and the rag with the tape thereon, what did you do with them?

A. Well, the first thing we did was to take a piece of the tape, I believe—it doesn't make much difference—and we cut a piece from it, and we took a piece from the tape and treated them in the same manner.

The Court: Wait a minute, now. You took a piece of tape from the roll, is that right, and then a piece of tape from the blue cloth in front of you?

A. No, the attached tape, took it from the attached [fol. 1353] tape.

The Court: The tape that was attached to the cloth?

The Witness: Yes.

The Court: All right, sir.

Q. Did there come a time when you compared the end of the tape on the roll with the tape on the blue cloth?

A. Yes.

Q. When did you do that?

A. Well, in the course of looking it over and so on I noticed that it was——

The Court: Wait just a minute. Don't say what you noticed. You did make a comparison?

The Witness: Yes, we did.

The Court: All right.

Mr. Starkey: I ask that this document be marked for identification.

(Government's Exhibit 30 marked for identification.)

Q. I show you Government's Exhibit 30 for identification and ask you if you recognize that picture.

A. Yes, I do.

Q. Is that a fair representation of the condition of the [fol. 1354] tape on the roll and the tape on the cloth at the time of their delivery to you?

A. Yes.

Mr. Carluccio: Objection, your Honor. It is leading.

The Court: Overruled.

Mr. Starkey: I will offer Government's Exhibit 30 for identification in evidence.

Q. Had you made any cuts or any changes in the condition at the time this picture was taken?

A. Well, I had taken a cut out of the roll of tape.

Q. The square one in the middle?

A. Yes.

Q. Had you touched the end at all?

A. It wasn't anywhere near the end, yes.

Q. And that is all you had done?

A. Yes, on the roll, and I cut some out of the tape attached to the blue cloth, the blue rag.

Q. Well, where had you cut from the blue rag? Had it been from the edge which fits into——

Mr. Carluccio: Your Honor, I think he should refer to the exhibits. We won't have any record of "this".

[fol. 1355] The Court: Just a minute, please. Show the piece of tape that you didn't cut that is attached to the cloth.

The Witness: Here.

The Court: The one you have in your hand is the part that you didn't cut.

The Witness: Well, this was not too large a piece as I remember, so we cut a piece here.

Q. Was it a straight cut?

A. It wasn't cut with a die like this was. It was such a piece that we wanted to get a representative sample so I cut it with a razor blade to get it out of there and then trimmed it off with a pair of scissors.

Mr. Carluccio: For the record, Mr. Starkey, he is referring to a piece of tape stapled to the blue cloth Exhibit 13, and it's the smallest of the two pieces of tape.

The Court: That's right. Let's proceed.

Mr. Starkey: I offer Government's Exhibit 30 for identification in evidence.

The Court: Proceed with the examination.

Q. Now, did you measure the width of the tape on the cloth and on the roll?

[fol. 1356] A. Yes.

Q. What was the width?

A. Three inches.

Q. Of each?

A. Yes, the roll and the tape on the cloth.

Q. Did you make any further examinations or any further examinations besides measurement of the tape on each?

A. Yes.

Q. What examinations did you make?

A. With the piece—well, I will take the roll first, I took a piece there, and we cleaned it up, in other words, extracted with solvent and took the adhesive off of that leaving just the cloth, and then the cloth was analyzed.

We counted the number of warp threads per inch, and the filling picks per inch——

Q. And what were the numbers of each?

A. And then—well, I will finish by saying that then I took a piece from the tape that was stuck to the cloth and analyzed it also, cleaning up the adhesive, cleaning the adhesive off, and then taking the cotton cloth that was left and treating it the same way, counting the threads in the warp and the filling threads in the threads in the [fol. 1357] filling.

Q. And what were they? What were the numbers?

A. There were 82 threads per inch in the warp and—do you mind if I refer to my notes?

The Court: Go ahead.

A. 82 warp threads per inch, and 76 filling threads per inch, and then having taken those yarns apart it was then easy to figure the yarn size of these two different yarns.

Q. What were they?

A. The warp yarn size was 32 singles. That means a single yarn, not a two-ply. And the filling yarn size was 44 singles. In both cases the figures were the same. The tape from the roll and the tape from the cloth, that was stuck to the cloth.

And I might add that they both weighed three ounces per square yard.

Q. They weighed the same also?

A. The cloth would be three ounces per square yard.

Q. And this was true of both the tape on the role and the tape on the cloth?

A. Yes.

Q. Now, after this examination did you reach any con- [fol. 1358] clusion as to whether or not the tape on the cloth was off the role?

Mr. Carluccio: Objection, your Honor. I don't believe that he has been properly qualified as an expert on the matching of tape. Again——

The Court: You may examine him on the voir dire. The Court will accept him unless you can show that he is not qualified. Apparently he is qualified.

By Mr. Carluccio:

Q. Sir, Mr. Logan, during the regular course of your business and work with the government your analysis is mainly for the purpose of determining duty on specific items?

A. Yes, I would say so.

Q. And how often do you have to make an examination to determine whether one piece of tape or one piece of tape came off a specific roll?

A. Well, we never have that.

Q. You never did that before until this time?

A. No.

Q. You mean this is the first time that you ever had to

determine whether a piece of specific cloth or tape came off another piece of specific cloth or tape?

[fol. 1359] A. No, not adhesive tape but we have had cloths that had heavy sizing and various substances on them that we had to clean off before we could get down to the base of the cloth so it is something similar to that, but I never had tape, I never had adhesive tape before.

Q. With cloth rather than adhesive tape how many times did you so analyze pieces for specific——

A. I didn't hear that question.

Q. You said it other times, you had to make analyses other times not for tape but for cloth. How many times?

A. Oh, that is quite frequently. The use of resins and the various finishes they put on cloths now is quite——

Q. To match up one piece with another?

A. Oh, no, not that.

Q. How many times would you have to match up one piece of cloth with another specific piece of cloth?

A. About the only thing that would come into that would be the analysis as I pointed out, about putting the threads per inch, ounces per square yard, and in that way you analyze two samples a lot of times and they match up [fol. 1360] in that respect.

Q. But other than this time, today, you never had to match up one specific cloth or tape with another specific cloth or tape and give an opinion as to whether they came from the same bolt or the same roll?

A. No, I think not.

Mr. Carluccio: I move that his testimony be stricken because he is not qualified. He never did it before in his life, your Honor.

The Court: Is it your testimony that you never examined a piece of cloth as against another piece of cloth to see whether or not the two pieces of cloth came from the same bolt or the same supply?

A. No, we wouldn't get a request like that.

The Court: What type thing do you do, sir?

A. Well, the examiner that handles various textiles sends them up to us to be analyzed, and the main thing that they want in a cotton cloth, as this turned out to be

the base cloth, is that average yarn size and the same length, and if it's a cloth how it is woven. And we give him the answer, and then he can determine the rate of duty. But I don't think I have ever had to compare, as in this case, a piece of cloth with another piece of cloth for customs purposes.

[fol. 1361] The Court: Well, has it ever been your business to reach conclusions as to whether or not one piece of cloth are the same?

The Witness: That just doesn't come up at all.

The Court: You don't do this?

The Witness: No.

The Court: As I understand it, what you do do, though, is you take a piece of cloth and you examine it to see how many threads in the warp and how many threads in the woof, and then you see what kind of a yarn it is and so on?

The Witness: Yes, you determine the average yarn size and that is the way the duty is put on.

The Court: As I understand your testimony, you took the adhesive off of the cloth part of the tape.

The Witness: Chemically, yes.

The Court: That was a sample that was taken from can and the sample of tape that was taken from the blue cloth, and you counted——

The Witness: The sample of tape taken from the blue cloth.

Q. Yes, and you counted the threads in each and you [fol. 1362] weighed the yarns in each?

A. Yes. We had to weigh the separate yarns in order to get the yarn size.

The Court: And my understanding of your testimony is that you found the number of threads both ways were the same in each.

The Witness: That's right.

The Court: And the weight of the yarn is the same?

The Witness: The weight of the cloth was the same.

The Court: Is that your testimony?

The Witness: Yes.

The Court: And that is all it is, I guess.

The Witness: Yes.
The Court: All right.

By Mr. Starkey:

Q. And the width was the same?
A. Yes.

The Court: Yes.

Q. Now I show you Government's Exhibit 30 for identification——

Mr. Carluccio: Your Honor, have you ruled on the admissibility of this yet?

[fol. 1363] Mr. Starkey: It is still for identification.

The Court: I haven't ruled on it yet.

Q. And I ask you with specific reference to these edges which I am pointing out, did you tamper with those in any way?
A. No, sir.

Mr. Carluccio: What is he pointing to?

A. Do you mean the cuts?
Q. I will ask that question again. With reference to these jagged edges to which I am pointing, did you tamper with those in any way?
A. Oh, no.

Mr. Pogoda: If the Court please, I object to the form of the question. I think the witness should be asked not what he did not do, but what he did and ask whether he did that.

The Court: To get to the point, get the end of the tape from the can and get the end of the tape from the bluedemin cloth and see if they match. Let's get it over with. We will fool around with it for an hour.

Mr. Starkey: All right, your Honor.

The Court: Don't do that with him. Anybody can see if it matches. You don't have to be a genius to do [fol. 1364] that.

Mr. Starkey: I think the picture will facilitate the examination and I would like to have the witness testify,

which he has done, that as far as the points with which we are concerned in this photograph, he didn't touch those in getting his samples.

The Witness: Certainly not.

The Court: Haven't you got the two exhibits right there before you?

Mr. Starkey: I do, your Honor.

The Court: Why don't you put them together and see if they match.

Mr. Starkey: All right, your Honor.

The Court: Put it there on the jury rail.

Mr. Pogoda: May I at this time object to Mr. Starkey exhibiting the photograph in the presence of the jury when it is not in evidence.

The Court: I don't think he was exhibiting it, sir, and let the record show that he wasn't exhibiting it.

The Witness: It's kind of dried up now.

Mr. Carluccio: Let the record show that——

Mr. Starkey: Your Honor, I object to the comments of counsel.

[fols. 1365-1384] Mr. Carluccio: Your Honor, he is showing something to the jury and I would like the record to show that that there is nothing on the record to show what he is matching up, your Honor. I just wanted to say let the record show that counsel is trying to match up the end of the tape which is in one exhibit in evidence with the larger piece of tape which is on Exhibit 13 and that was what counsel did.

The Court: All right, sir.

Mr. Carluccio: And now let the record show that counsel is making up the end of the tape on the roll with the smallest piece of tape that is on 13.

* * * * * * *

[fol. 1385] June 26, 1961.

FINBARR J. MURPHY, called as a witness on behalf of the government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Starkey:

Q. What is your occupation, sir?

A. I am a customs agent with the Treasury Department, Bureau of Customs.

Q. How long have you been so employed?

A. Approximately four years.

Q. Are you the agent in charge of the investigation of this case?

A. I am.

Q. Were you on duty on May 6th of 1958?

A. I was.

Q. Did there come a time on that date when you boarded a Grace Line vessel by the name of the Santa Maria?

A. Yes, sir, at approximately 2.30 p.m. on May 6, 1958.

Q. Will you tell the Court and jury what you did and [fol. 1386] what you observed thereafter?

Mr. Carluccio: Objection, your Honor. If it is to be in narrative form, I don't think it is proper at this time. I think it should be in question-and-answer form.

The Court: I will overrule the objection. It might be quicker this way.

A. On May 6th, at that approximate time, 2.30, I boarded the Santa Maria, and I went to the room of the defendant Massiah. At that particular time I was accompanied by, I believe, two customs searchers. During this time we conducted a search of the defendant Massiah's quarters, bunk and his person. We looked for the false bottom of lockers; we searched under the locker, and there was a false bottom under the locker, took out some screws. I was watching the searchers go through the shelves in his locker, and——

Mr. Carluccio: Did he say there was or there was not a false bottom? I didn't get that.

The Witness: There was.

Mr. Carluccio. There was?

The Witness: Yes. All these lockers have false bottoms. They are built about four inches off the ground.

Q. I show you Government's Exhibit 27 and ask you [fol. 1387] if you recognize that roll of tape.

A. Yes; I do.

Q. When did you first see that roll of tape?

A. I first saw this roll of tape approximately 3 o'clock. I observed it in the locker of the defendant Massiah. During the search I personally opened that myself, as there is a compartment within that tape, and I observed its ragged edge, and at that particular time it didn't mean anything to me, so I put it back, and I instructed the searchers to continue their work.

Q. What happened thereafter?

A. Oh, approximately 3.30 I was informed that a seizure had been made, and it was apparently cocaine.

Mr. Pogoda: I move to strike out what he was informed as to what it was, as being purely hearsay.

The Court: I grant your motion and instruct the jury to disregard the witness' statement as to what he thought it was.

Q. Did there come a time at about 3.30 when you had a conversation with some other customs officers?

A. Yes.

Q. What did you do after that conversation?

A. After that conversation I was interviewing the defendant Massiah in the headquarters established aboard [fol. 1388] the ship.

Q. Who else was present at that time?

A. I believe it was Agent McVeigh and myself.

Q. Did there come a time when Agent Cozzi interviewed the defendant in your presence?

A. Yes.

Q. When did that take place and where?

A. That took place approximately 7.30, I believe.

Q. Will you state what was said at that time by Agent Cozzi and the defendant.

A. Agent Cozzi came into the room with this roll of tape here, and he asked the defendant Massiah, did he

own the tape, to which defendant Massiah stated that he did and that he had bought it in a South American port.

I, too, asked him, and he told me he had bought it in Callao. He stated that he had hurt his left arm, and it was for that reason that he had the tape.

Q. Now, did there come a time thereafter when you placed the defendant Massiah under arrest?

A. Yes. Soon after his stating that he owned the tape, he was placed under arrest.

Mr. Starkey: I ask that this document be marked for identification as Government's Exhibit 32.

(Marked Government's Exhibit 32 for identification.)

[fol. 1389] Q. I show you Government's Exhibit 32 for identification and ask you if you recognize that document.

A. Yes. This is a——

The Court: Wait. You do recognize it.

The Witness: Yes, sir.

Q. Where and when have you seen it before, and when did you first see it?

A. I came into possession of this document here—it is a National Maritime Union membership book.

Mr. Pogoda: I will object to the witness reading from anything that is not in evidence.

The Court: Don't read from it. Just answer, when did you come into possession of it and how?

A. (Continuing) On May 6, 1958, I took this from the person of the defendant Massiah.

Q. At the time of his arrest?

A. That is correct.

Mr. Starkey: I offer Government's Exhibit 32 for identification in evidence.

Mr. Carluccio: For the enclosures that are in there now in the union book when you got it?

The Witness: I believe so.

Mr. Carluccio: Well, do you know?

The Witness: Well, that book has been in the custody of the United States attorney here, and that is just the

[fol. 1390-1393] way I brought it over, and I would state that it was.

Mr. Carluccio: With all these enclosures?

The Witness: Yes.

Mr. Carluccio: And the photograph?

The Witness: I believe so.

Mr. Carluccio: No objection.

(Government's Exhibit 32 for identification received in evidence.)

By Mr. Starkey:

Q. Agent Murphy, I will ask you to read to the jury from Exhibit 32 the matter contained therein relating to one Renie.

A. On page 13 of this document there is a notation in green ink spelled "Renie", and the number is 6085.

Q. I ask you also to read the telephone number on Government's Exhibit 1, the telephone toll slip on Jesse Colson's telephone.

A. This document shows "Valparaiso, Chile, 6085, Renie Huasaff."

* * * * * * *

[fol. 1394] Q. Do you know where the declaration of the defendant Winston Massiah, also a crewman on this ship, is at this time?

A. No; I don't

Q. Have you ever had it in your possession?

A. I have had it in my possession, yes.

Q. And what did you do with it?

A. It came into my possession. I ordered it from the record center at the time Elita Lloyd came to me with a note from Winston Massiah, a "To whom it may concern" note, requesting that I turn over some personal effects and some articles that were supposed to be declared. That is the time I had it in my possession. And Agent Cozzi was with me, and he filled in the required form, the required cashier form, for duty purposes. And Elita Lloyd received defendant Massiah's personal effects and paid duty in the amount of $7.09, I believe. We had

to have that dec to make notations as to what he declared.

Q. All right. What happened to it after that?

A. I believe I sent it back to the record center again, as I had no more use for it. What happened to it after that I don't know.

[fols. 1395-1397] Q. Do you know whether or not the document is still charged to you as a record?

A. Yes. I am informed that it is charged to me as a record.

Q. So that you are on record as charged with the document, but you do not know where it is?

A. I do not know where it is. I called for that record, and it was sent up. That is the way they usually charge it.

Q. Did you throw the document away to spoil evidence?

A. No.

Q. Did you destroy it?

A. I did not.

Q. As far as you know, it has merely been misplaced?

A. That is what I believe. It is misplaced someplace.

Q. Now, you say you did see the document?

A. I definitely did, yes.

Q. Was there any cocaine manifested or declared on that document?

A. No; there was not.

* * * * * * *

[fol. 1398] A. Agent Murphy, did there come a time when you saw the defendant Massiah and the defendant Colson together?

A. Yes; there did.

Q. When was that, sir?

A. That was on November 19th, 1959.

Q. And where did this meeting occur?

A. The meeting occurred on West 146th Street, between Seventh and Eighth avenues at approximately 9.30 p.m. in the evening.

Q. And were they on the street?

A. No. This meeting took place in a car operated by Jesse Colson in 1958—a 1958 Chrysler Imperial.

Q. Were you able to overhear what was said?

A. Yes; I was.

Q. By what means?

A. Prior to this meeting, with the agreement of Jesse Colson, I had placed a Schmidt portable transmitter under the front seat of that vehicle. This device enabled me to pick up the conversation as I am sitting in another [fol. 1399] car.

Q. Will you tell the jury what you heard Colson and what you heard Massiah say at this time.

Mr. Carluccio: Your Honor, I seriously object to this evidence and feel that it is illegally and improperly obtained and constitutes a violation of the constitutional rights of my client. It comes under the category of eavesdropping, tape recording, wiretapping. Also I submit that, being that it was placed under the seat, the back seat, as he states, and I believe at the request of the government, with the cooperation of Jesse Colson——

May I ask this question:

Did Jesse Colson cooperate in helping you to place this transmitter behind the seat of the car, Mr. Murphy?

The Witness: Yes; he did.

Mr. Carluccio: —with his cooperation, wherein Jesse Colson was acting as an agent for the government, that this also constitutes entrapment, and this evidence is illegal and inadmissible, and it should not be admitted at any time in this trial.

Mr. Pogoda: I further object that unless this witness can testify he observed the two of them and only the two [fol. 1400] of them in the automobile, the conversation cannot be identifiable unless this witness is prepared to swear that he knows the voices of both people and knew the voices of both people at the time the alleged recording or transmitting or transmission was made.

The Court: Are you prepared to have the witness testify that he recognized the voices?

Mr. Starkey: Yes, your Honor. He previously testified that he talked to Massiah on May 6.

By Mr. Starkey:

Q. Did you recognize his voice on this occasion in November?

Mr. Pogoda: If the Court please, the conversation with Massiah was on May 6th of 1958. There was one conversation. And here we have a conversation on November 19, 1959, a year and a half later. I submit that the one conversation is insufficient as the basis for the recognition of a transmitted telephone voice, and I object to any such response to the question asked by Mr. Starkey.

The Court: Is that the only time you heard the voice of Massiah prior to this recording?

The Witness: No.

[fol. 1401] The Court: This really was not a recording, was it?

The Witness: No. It was transmitted through the air.

The Court: It was a transmission?

The Witness: Yes.

The Court: Received simultaneously by you by radio, I guess?

The Witness: I have earphones to pick it up.

A. (Continuing) Subsequent to the arrest of Massiah, I believe I spoke to him in the Federal House of Detention.

Q. Have you spoken to Massiah since then?

A. Yes. I have spoken to Massiah in your office, in November of 1960. I spoke to Massiah—I had a conversation with him in the office of Callandra, I believe, when he came up to look at these particular exhibits here.

Q. Do you have any doubt that the voice you heard over the Schmidt device was Massiah's voice?

A. No doubt at all, my reasons being that I had been speaking with Jesse Colson.

The Court: Wait just a minute, please.

The question before the Court now is whether or not you recognized this voice, which was coming over, as the [fol. 1402] voice of Massiah. We are not interested in what anybody told you about it. We are interested in finding out whether or not you recognized Massiah's voice.

The Witness: Yes. I recognized it.

Q. Could you also view the conversation as it took place?
A. I could.

The Court: You were looking at these people at the same time?

The Witness: Oh, yes, sure.

The Court: You were looking——

The Witness: I had them under observation visually and electronically.

The Court: I see. And you could see that there were only two people in the car?

The Witness: There were only two people: the driver and the defendant Massiah.

The Court: And you were familiar with Colson's voice?

The Witness: Oh, yes, quite familiar.

The Court: You had been talking to him daily for weeks, I assume?

The Witness: Months would be more like it.

The Court: Months?

The Witness: Yes.

[fol. 1403] The Court: And did you recognize Massiah in the car physically by seeing him?

The Witness: I recognized him just opening the door, and when he got inside I recognized him also.

The Court: In other words, you recognized him as the defendant, and as the other person in the conversation with Colson?

The Witness: I did, sir.

The Court: What was the date of this conversation?

The Witness: November 19, 1959.

The Court: And this was after Colson's arrest?

The Witness: Yes. Colson was arrested in July, 1959.

Mr. Carluccio: Your Honor, if the Court please, I also wish to make known to the Court one other reason for my objection, and that is the best evidence rule. I feel that if this is a conversation between Colson and Massiah, and Colson was present at the conversation, that Colson should be brought in to testify as to what was said and how it was said.

Mr. Starkey: Your Honor, I object to——

The Court: Wait a minute.

Mr. Carluccio: The reason being twofold: Colson is [fol. 1404] available for testimony——

Mr. Starkey: I cannot let this go any further, your Honor. This is gross misrepresentation on the part of the attorney.

The Court: The jury will disregard what counsel on either side will say here as to the availability of Colson. The jury is not informed as to the availability of Colson.

Mr. Carluccio: When we find that he is alive—not that he has passed away—however, that Colson can testify as to what was said, and I make also the analogy with the tape that we had introduced with the rag: it is not a photograph of the tape, so likewise, the best evidence in this instance is the conversation as Colson heard it from Massiah, in addition to which, as your Honor well knows, the reason for this conversation, most probably, was to pump the defendant for admissions, and if they are admissions against my client's interest, it has always been a rule of law that admissions may be explained, the full circumstances around the admissions and how the statements were made.

In this respect I can't cross-examine an inanimate tape recording, because all Mr. Murphy will be stating in his examination by Mr. Starkey will be the inanimate words [fol. 1405] of what he heard on this machine, this tape recording.

If Colson is here to testify, we can find out not only what was said, your Honor, but how it was said, the demeanor of the parties, where it was said in a jocular fashion, whether it was said in a serious fashion, and the like. And I feel that if counsel wishes to bring out admissions, they should be brought by the best evidence, Mr. Colson, who was there, not a hearer of an inanimate recording, so that our right of cross-examination is not curtailed.

The Court: That is overruled. The Court is going to admit the language as far as possible as to what Massiah said, not what Colson said. In other words, I don't want you to give what Colson said at all. I just want you to give what you heard, as the words came from Massiah's mouth.

The jury is also instructed that this evidence is binding only on the defendant Massiah. This evidence is not to be construed in any way with reference to the guilt or

innocence of the other defendants on trial. This is evidence only as to the defendant Massiah.

All right. You may proceed.

Mr. Starkey: In regard to the application of the de-
[fol. 1406] fense just now, I would merely like to state for the record that I have submitted to the Court and defense counsel the government's memorandum of law citing On Lee, in which the Supreme Court ruled on this precise question.

The Court: All right.

By Mr. Starkey:

Q. What was said by Massiah during the course of this conversation?

A. Massiah stated——

The Court: Wait just a minute, please.

Delete from what Massiah said anything about anybody else participating except Massiah. Do you follow me?

The Witness: Yes.

The Court: In other words, don't give us anything about anybody but Massiah, since this is only binding on Massiah. Omit from your testimony anything with respect to any other person, including the defendants in this case.

Mr. Pogoda: If the Court please, if there is a typewritten transcript of the conversation, I think the defense should have the opportunity to examine it.

The Court: Yes.

[fol. 1407] Q. Now, will you proceed, Agent Murphy.

A. The defendant Massiah stated that during this time he had made a million mistakes and that instead of fighting each other, they should be fighting hard to win this case. He stated that while in Valparaiso, Chile, at the home of Renc Huasaff, he sat down and wrote a letter to New York stating the exact amount of cocaine he was bringing in, the exact amount that Rene Huasaff expected of him. He said this letter was written in the presence of Rene and his wife. He stated that he had the cocaine in his room in a suitcase for approximately 22 days, and that two days out of New York he noticed the cocaine was evaporating. He got the roll of tape and attempted to make it airtight so that there would be

no further evaporation. And he stated that it was this tape that got him in all this trouble.

Q. Do you recall any further conversation?

A. Yes. He stated that on arrival he met a longshoreman and that he motioned him through the passageway to show him where the cocaine was sitting, and that while walking through the passageway he saw two big men following him. He states that, "Jesus Christ, they must have been bulls"—the exact words. To that he said, "I told the longshoreman to come back later, it was too hot." [fol. 1408] He stated that he intended to give the longshoreman all the cocaine at that time.

Q. Do you recall anything about the informer?

A. He stated that the informer—it's a bit difficult to get this across. He stated that he knew who the informer was in this case, and that he thought that besides the informer there were other people involved. He stated that, "If they knew so much about my meeting Rene in his truck in Valparaiso," that the Feds must have been watching him a lot longer than what they had anticipated.

Q. Can you recall the exact words about the informer? Were any names mentioned?

A. Yes. The informer was named as Frank Torres.

Q. Was anything else said? What was said, Agent Murphy? Were any other possibilities discussed?

A. Yes. The defendant Massiah stated that he was not stealing from the packages as they were coming in in the past, and he could not see how anybody could accuse him of stealing from any of the packages, because it was not in his makeup to steal, and if he did, he would be afraid of revenge on the part of his fellow-conspirators.

Mr. Carluccio: Objection, your Honor, especially as to [fol. 1409] the last part.

Mr. Starkey: The government consents to strike out "conspirators".

Mr. Carluccio: "fellow-conspirators"—that whole phrase.

The Court: The motion of counsel to strike is granted, and the jury is instructed to disregard that part of the testimony.

Q. Was May, the chemist, mentioned?

A. Yes. The defendant Massiah stated that besides Frank Torres, he had just remembered that the biggest informer of all—the exact words—the biggest stool pigeon of all was a woman he identified as May, a federal stool pigeon, and it could have been May, because he had some dealings with May. And besides the information they probably got together, the Torres information, "and that's how I was fingered."

Q. And you said a chemist was mentioned?

A. Yes. Massiah stated that at one time, while in Valparaiso, he remembered Rene introducing him to a chemist by the name—he didn't mention his name—he said a chemist with a gimpy leg, and he thought perhaps it was also the chemist who could have put the finger on him besides Torres.

[fol. 1410] Q. Did he say why he thought this?

A. Yes. He stated that during the transaction this man stood right there, and he was present while the transaction was going on in the past. And he had personal knowledge of just what was transpiring.

Q. Was anything said about a misapprehension by Colson?

A. Yes. Massiah stated that Rene questioned him as to who was going to get the load.

Massiah stated that Colson was to get the load, that he was going to handle all the distribution of it.

Then Colson—Massiah stated that, "I told Rene it was all for you and that I have no intention of stealing anything."

Q. Did there come a time when you saw Colson and the defendant Anfield together?

A. Yes; there did.

Q. And when was that?

A. This was on December 5, 1959, approximately 9:30, 9:45, in the southeast corner of Lenox Avenue at 118th Street.

Q. Did you see whether or not they conversed?

A. Yes.

Q. Where did the conversation take place?

[fols. 1411-1417] A. The conversation took place in a 1958

Chrysler Imperial driven by Jesse Colson. The defendant entered into the car and entered into a conversation with Colson.

* * * * * * *

[fols. 1418-1435] Mr. Pogoda: If the Court please, I respectfully press my objection. An improper foundation has been laid for a conversation between the defendant Anfield and Colson, to which the witness is about to testify.

The Court: That is overruled. The jury is instructed again that this testimony which will be given is binding only on the defendant Anfield. It is not binding on anyone else other than Anfield, since it is his own statement.

Further than that, the witness is instructed to give the testimony without reference to any of the other defendants on trial. I am not assuming that there was any reference in these conversations to any other defendants, but in the event thaf there is, you should eliminate that from your statement.

* * * * * * *

[fol. 1436-1437] Direct examination continued.

By Mr. Starkey:

Q. Insofar as the conversations between Colson and Anfield and Colson and Massiah in the automobiles were concerned, do you know whether or not there were any other devices present besides the microphone over which you heard the conversation?

A. Yes; there was.

Q. And what was it or what were they?

A. It was a Minifon tape recorder that I had placed in the glove compartment of Jesse Colson's car, and we taped the conversation.

* * * * * * *

[fols. 1438-1446] Mr. Carluccio: I object, your Honor. There is a great deal of objectionable material in the tapes by virtue of the fact that you directed Mr. Murphy's testimony only to evidence that was concerned with the par-

ticular defendant, and in addition there is not only that, as I can see from two of the records there are privileged matters; there are many other matters in there.

The Court: I sustain the objection. Proceed. It is your witness now. You may cross-examine.

Cross-examination.

By Mr. Carluccio:

* * * * * * *

[fol. 1447] Q. Mr. Murphy, were you present when Mr. Cozzi put handcuffs on himself on the Santa Maria?

A. Yes.

Q. Can you tell us what you recall with reference to [fols. 1448-1449] Mr. Cozzi putting handcuffs on himself?

Mr. Starkey: I will object to the form of that question and also to the line of questioning.

Mr. Carluccio: Your Honor, I would like to know what happened and what he saw and what was said at that time.

The Court: I overrule the objection.

Suppose you just give us what you know about this incident, please.

A. Yes. Cozzi put the handcuffs on himself for the particular purpose—we were trying to effect a delivery of the cocaine, and we wanted Massiah's cooperation. I observed Jesse Colson out in the '58 Chrysler, waiting outside the pier.

* * * * * * *

[fols. 1450-1453] Cross-examination.

By Mr. Pogoda:

Q. Now, Agent Murphy, when were you originally assigned to this case?

A. In April, the end of April.

Q. Did you have occasion to speak to Frank Torres?

A. Yes.

Q. And the information you received from him was that

there was a shipment of cocaine coming in on the Santa Maria; isn't that so?

A. In part, yes.

. . . . . .

[fol. 1454] Q. You knew, or at least you had information that stuff was being brought in and that Massiah was the one who was bringing it in; is not that true?

A. That's correct.

Q. And at any time did you allow yourself an opportunity to apprehend or seize Massiah with this stuff?

Mr. Starkey: I submit counsel just ignores the Court's ruling. This is almost the same question to which an objection was sustained.

Mr. Pogoda: In one I asked for an opinion.

The Court: It might be quicker if we just let him answer the question.

Why did you go about it this way instead of waiting until Massiah or somebody picked it up and brought it off the ship?

The Witness: We had a conference on that down in Stone Street as to the best way of handling it. You have to be familiar with the pier to realize that when longshoremen go on these ships, and with passengers coming off, crewmen are running around, it's pretty hard to control the situation. So we figured it was best to sort of bottle [fols. 1455-1456] up Winston Massiah rather than taking a chance of observing him from any vantage point where you might miss the switch from the longshoremen to Winston Massiah, and rather than taking the change of having the cocaine enter into distribution here in the City, we decided to work this way: bottle up Massiah, because our information was that he would lead the longshoreman to the area, and that way the longshoreman couldn't get to the spot where the cocaine was until he had clearance from Winston Massiah. That was the reason for this.

Q. You knew that the stuff would be concealed in the afterpeak of the ship?

A. Or in the bottom of the locker or in the afterpeak of the ship, right.

Q. That is right. Behind some rope. You knew that?
A. That's right.

. . . . . .

[fol. 1457] Q. Did you speak to Frank Torres?
A. Yes. I was in touch with Torres.
Q. He was your sole source of information; is not that true?
A. He was, and the Police Department had the same thing on this matter.
Q. On which matter?
A. Involving Massiah.
Q. You mean, the New York City Police Department had information concerning this shipment on the Santa Maria?
[fols. 1458-1463] A. Yes. They had pretty near the same stuff we had.

. . . . . .

[fol. 1464] The Court: All right, sir. I will overrule the objection. However, if you are going to get into conversations with Colson, I suggest to you that you may get into evidence something that you might not want in evidence.
Mr. Pogoda: I am not asking for the substance of the conversations. I am merely asking how many conversations there were.
The Court: Overruled.
(To the witness) How many conversations were there, about?
The Witness: Well, there were quite numerous conversations.
The Court: Ten, twenty, fifty?
The Witness: Twenty or thirty.

By Mr. Pogoda:

Q. Can you tell us, to the best of your recollection, in which conversation the name of the defendant Duke Anfield came up?
A. Well, when Jesse Colson decided to cooperate, his name came right up.

[fols. 1465-1469] Q. Well, when was that? How soon before you approached Duke Anfield and had a conversation with him?

A. Well, Colson began to cooperate in July, July 27, 1959, I think. And how soon—what? What was the next question?

Q. How son after that did you have a conversation with Duke Anfield?

A. That was after the recording, or in or around that period there before his arrest, December 5, 1959.

• • • • • • •

[fols. 1470-1480] Q. And Colson was cooperating with you in July or August of 1959; is not that true?

A. That's correct.

Q. Now tell us, as a law enforcement officer, what you did from July or August, 1959 until Schoolboy was apprehended in 1961, to locate him. What you did to try and apprehend him.

A. My particular job—my main interest in this investigation was to obtain evidence against Massiah and the seamen and the longshoremen, if possible. As a Customs agent, that is what I am primarily interested in, to stop the smuggling across the borders. To do that itself takes a lot of work. I've got other cases. I have been out of the City.

• • • • • • •

[fol. 1481] You had no evidence, other than the word of Colson and Torres concerning any of these defendants?

Mr. Starkey: Your Honor, I will object and ask that a time be fixed.

Q. (Continuing) At the time of your conversations with Colson and Torres, all you had was their word, am I right?

A. As the implication of any of these defendants?

Q. Yes.

A. Well, among other things, besides the conversation, I had the roll of tape, which I figured was evidence, piece of cloth, names of Rene, telephone number, Chile, toll slips, calls made by Colson, which matched

up with the telephone number. I had all those little [fols. 1482-1534] pieces of information.

* * * * * * *

[fol. 1535] Further Cross-examination. By Mr. Carluccio:

Q. Agent Murphy do you know a seaman, Castro?
A. The first name?
Q. Jose N. Castro?
A. Yes.
Q. Was he a shipmate with Massiah on the voyage in question?
A. Yes; I believe he was.
Q. Did he state to you under oath that he had cocaine or narcotics aboard that Santa Maria during that voyage?

Mr. Starkey: That who had?
Mr. Carluccio: I am sorry. That Castro had cocaine or narcotics.

Q. (Continuing) Would you like to look at the grand jury minutes to refresh your recollection? I would like a yes or no answer on that (handing).
A. Yes.
Q. Your answer would be yes?

The Court: The answer to the question is yes?

A. What was the question?

(Question read.)

A. I have "yes" here.
Q. Yes?
A. Yes.
[fol. 1536] Q. And would you also say that he had some knowledge with reference to the particular package in question, the one that was found on the ship on May 6, 1958?
A. No. Not as I know the case.
Q. He didn't tell you he had some knowledge about that package?
A. The package was found on the ship.

Q. The package on the ship—did he know anything about the package? Yes or no.

A. As far as I remember, no.

Q. Do you want to read this again?

A. Yes.

Q. Surely (handing). You can read the rest, but——

(Record read.)

Q. (Continuing) Did he know anything about the package?

A. The package itself or the location?

Q. I didn't say the location. I said the package itself.

A. Not to my knowledge. I don't think he did.

Q. How about the location?

A. Yes. He told me about the false bottom and the shifting back aft.

[fol. 1537] Q. He knew something about the location of the package?

A. Yes.

Q. Was Seaman Castro ever arrested by you?

Mr. Starkey: I will object, your Honor.

The Court: What is the purpose of this question?

Mr. Carluccio: Your Honor, here is a person who, according to the testimony of Mr. Murphy, had cocaine aboard the ship, also knew something about where the package of cocaine was aboard the ship, and I suggest that it would probably be normal procedure to arrest this person, because he had some knowledge about the smuggling of cocaine, in view of the fact that he possessed some, through Mr. Murphy's testimony.

The Court: This man does not control who gets arrested and who does not, but in any event, suppose you answer the question.

A. He was never arrested.

The Court: Let us not ask him why. Let us proceed to something else.

Q. The roommates of Mr. Massiah: I think they were Enrico Silva and Rosario Romano: were those the only two or was there another one?

A. I believe that those were the only two.

[fols. 1538-1551] Q. Did you question them about the take?

A. Yes.

. . . . . .

[fols. 1552-1840] Q. In addition to Enrico Silva and Rosario Romano, what other crew members did you question with reference to this package? Castro we already spoke about.

A. I think there was a fellow by the name Fernandez. That is about all. Once the tape was matched up, I thought I had my man.

. . . . . .

[fol. 1841] (2:50 p.m. In the robing room.)

COLLOQUY BETWEEN COURT AND COUNSEL RE AVAILABILITY OF TRANSCRIPT TO JURY

The Court: The jury has sent the following note to the court:

"May the jury see that portion of the transcript or hear that portion of it read that covers Massiah's conversation with Colson's car."

Now, will counsel state their positions with reference to the request of the jury?

Mr. Carluccio: I state for the defendant Massiah that I request that this portion not be read to the jury because it overemphasizes a portion out of perspective [fol. 1842] with the other portions of the testimony. The recollection of the jury is what controls, as your Honor has charged, in addition to which this particular portion, not withstanding the fact that it is derogatory to the defendant Massiah, was vehemently questioned as to its admissibility in evidence.

This was a conversation by a government informer in furtherance of the government by way of what I call entrapment, with a small "e", so by virtue of the testimony it shouldn't be given, and it would put it all out of context.

The Court: The position of the defendant Thorn?

Mr. Archer: Well, I will go along in support of the contention made by the attorney for the defendant Mas-

siah and further state that I don't recall having voiced any opinion with reference to admitting any papers or relevant portions of the minutes with the other attorneys if they did make such arrangement with the U. S. Attorney.

The Court: Now for the defendants Anfield and Aiken.

Mr. Somers: On mature deliberation I join in the application of the other counsel that the jury recall this [fol. 1843] testimony as best it may without requesting or without the granting of any request on the part of the jury to have the stenographer read any particular portions of the testimony because I feel with counsel that that does unduly emphasize those particular references in reference to the whole of the testimony and that it would be unduly prejudicial and its probative value would be far outweighed by such possible prejudice.

The Court: The government's position?

Mr. Starkey: In the first instance, your Honor, on this question of reading to the jury the transcript of the testimony which becomes of importance in their deliberation, in light of the fact that this question was raised before the jury during my summation, at that point all counsel agreed that they should be permitted to hear such testimony in front of the jury, in the first instance, and I think that if they are not permitted to hear it they are entitled to know the reason why on this occasion, namely, that defense counsel have shifted their position and do make an objection of this kind.

In the second instance I think that, not withstanding this change of position and this objection on the part [fol. 1844] of the defense, that the jury is deliberating and is entitled to whatever tools and instruments they might reasonably use in an effort to facilitate their deliberations in their endeavors to reach a verdict, that it is customary practice in the Southern District of New York to permit them to have portions of the testimony concerning which doubts have been raised read back, and that if they have enough need of a clarification of that testimony to make a specific request in writing to the court, that the court, in the wise exercise of its discretion, should permit them the help they need under the circumstances.

I think that the rule or the practice of reading back testimony is no more unreasonable and no more unusual

than that of permitting them any exhibits in the jury room which went into evidence which would facilitate their deliberations insofar as a verdict is concerned, and that the same rule and the same reasoning should be adopted insofar as this testimony is concerned.

The Court: Well, I understand that it is the uniform practice in the Southern District to read parts of the transcript to the jury. However, I am not aware of any case [fol. 1845] which allows the reading over the objection of counsel representing the defendants. It would seem to me that the advisability and desirability of reading back the transcript can be argued both ways: One, the reading could help the jury decide the case. On the other hand, however, it may be that reading only a part of the transcript to the jury and not the whole transcript to the jury might emphasize unduly that part which is read, and in view of the fact that counsel representing all the defendants are opposing the reading of the transcript to the jury, the jury is going to be advised that counsel have not been able to agree on the reading of the transcript, and consequently the request of the jury will have to be denied with the suggestion that they recall the evidence for themselves.

I am not going to say that the defense counsel oppose it; I am simply going to say that counsel cannot agree, and the reason why I am saying that is, as counsel for the government stated, that there did seem to be some measure of agreement, at least as to reading some part of the transcript, and the Court, in its charge to the jury, did indicate that these portions of the transcript would be read to them if requested.

So I believe that it would be necessary, in these cir- [fol. 1846] cumstances, to tell the jury why their request is being denied without saying which side or which counsel are opposing it.

Mr. Somers: Don't you think, your Honor, that justice would be best served if you just said that—if you just asked them to resort to their best recollection from memory rather than even mentioning that there has been opposition by counsel to its introduction?

Mr. Carluccio: The logic of Mr. Somers' remark is that if the testimony obviously would be derogatory to the defendants, especially to Massiah, it could be well in-

ferred that one of the defense counsel would be against it and not government counsel.

Mr. Somers: Specifically since it was offered by the government and obviously these men—some of them who are of average intelligence, at least, can figure out that the government intends to stand by it, and if counsel objects to it the objecting counsel must be the defense. I think it would be best if they were just told that they were to resort to the best recollection that serves them.

Mr. Carluccio: We will go by that ground rule, though, [fol. 1847] that on agreement we would try to agree in the future as each thing comes up——

Mr. Somers: No. I would suggest that the ruling be constant throughout the trial, that their best memory serve them.

Mr. Starkey: Your Honor, in this regard the government would take violent exception to the defense, and specifically defense counsel having the benefit of a exhibition of the kind that occurred before the jury of agreement that testimony be read back, and then a refusal to do so, and lack of an explanation being given as to the reason for it.

Mr. Somers: No, I can't go with that. All the Court has to do is to tell them that it is in the Court's discretion. The Court feels that the best interests of justice would be preserved if their memory prevailed.

Mr. Starkey: Counsel did say in front of the jury that they would have no objection, and now the jury isn't going to have what was agreed they should have at that time.

Mr. Carluccio: I believe it is necessary to at least tell the jury that counsel haven't been able to agree about the reading of the transcript because there did seem to [fol. 1848] be some measure of agreement between counsel as to the reading of the transcript. And in the Court's charge it did say to the jury that the transcript would be made available to them, so I would think that some reason for not reading the transcript now is required.

Mr. Somers: Your Honor might be able to best serve that by mentioning that this is a three weeks trial and if they are going to ask for testimony every few minutes we might have to go through the whole three weeks all over again.

Mr. Archer: I think we ought to leave it up to your Honor to explain it to the jury.

Mr. Somers: If you say that counsel can't agree they must understand by that that this is an offer of government testimony, that the dissenting counsel certainly is not the government, it must be the defense and I think that would just defeat its purpose in telling them that, Judge.

You might just as well say that "I can't let him read this because of objection by defense counsel." It is saying it in a little bit different way, a little bit more euphemistically, perhaps, but I am sure they will grasp the fact that counsel [fol. 1849] who are objecting are the defense counsel. I think in fairness if your Honor just says that you feel that they should resort to their best memory, it will serve their purpose, and nobody will be prejudiced, despite Mr. Starkey's talk about vehement exhibitions.

Mr. Starkey wanted this opportunity for the jury to examine the records, I said it would be okay, and now you say it's best that they resort to their best memory and that way they can't be mad at Starkey or at me, either the government or the defense.

Mr. Starkey: I would object to the jury being misled in that regard. It was the judge's decision.

Mr. Somers: Well, if the judge hadn't brought that point to my attention—I am very grateful for it—I feel that he is absolutely right in that respect, that this taking it out of context does unduly pinpoint certain precise portions of the testimony that unduly prejudice the defendants because they can't read the whole testimony and have the proper perspective with respect to the particular pinpointed testimony that they asked for.

Mr. Starkey: I submit to the Court, your Honor, that, although I don't have cases at hand, that this is a ques- [fol. 1850] tion of the Court's discretion, and that it would be an abuse of discretion to constitute error in this instance, that clearly——

The Court: Just a moment. We have another note from the jury.

> "May the jury see the portion of the transcript and hear that portion of the transcript that covers

the information given to the customs officers by Torres."

Mr. Somers: Apparently they are considering Massiah throughout here at this point.

Mr. Carluccio: Your Honor, I think maybe we should clear up that point about whether there was an agreement to read certain portions. I think Mr. Somers said, something about his man Leon, and maybe Mr. Pogoda might have said something about it.

Mr. Somers: I did, about Leon Aiken.

Mr. Carluccio: I didn't join in it, and if that was the situation I am sure that Mr Somers wouldn't object to that portion if it is only that one portion, but I think on other portions——

The Court: Is the position of all counsel the same with respect to the second request to read the transcript? [fol. 1851] Mr. Carluccio: Yes, your Honor, especially so because with Torres there is a statement to the customs official that was marked for identification and never put in evidence.

Mr. Starkey: I submit, your Honor, that there is no question that a reading of testimony would be error any more than there is question that submission of exhibits upon request to the jury would be error, and that, the objection of defense counsel notwithstanding, the Court should properly give the jury the tools it requests in furtherance of its deliberations.

The Court: Well, I am going to deny the request, so let's get on the bench.

(The following proceedings took place in open court.)

(Jury present.)

Mr. Starkey: Your Honor, with regard to the conversation just had, may I approach the bench with counsel?

The Court: All right, step up.

(The following proceedings took place at the bench.)

Mr. Starkey: Your Honor, I have a suggestion at this point which I think may well meet the objection raised [fol. 1852] by defense counsel insofar as the reading of

the government's evidence concerning these conversations, and that is that—had it occurred at the time the testimony actually was given—cross-examination as well as direct examination concerning these matters be read to the jury and that way defendants will not be deprived of any rights, nor be the victims of any prejudice any more than they were at the time the testimony was actually taken.

Mr. Somers: We object to it, your Honor.

Mr. Archer: It will be like trying over the case.

Mr. Carluccio: And not only cross-examination, but you would also have to bring in the summation.

The Court: All right, same ruling.

(In open court.)

The Court: Ladies and gentlemen, the Court has considered the requests which have been made to read the transcript, and even though the Court did indicate in its charge that if the jury wanted parts of the transcript read, it would have those parts read to the jury, it is the Court's feeling now that to read certain parts of the transcript and not read the entire transcript would be to unduly emphasize [fol. 1853] that part which was read, and consequently the Court feels that the jury should take the time to recall the evidence the best it can from having heard the evidence and come to a conclusion in this matter based on hearing not only the evidence which the jury wants reread now, but all of the evidence in the case.

Now, I am very reluctant always to deny a request of the jury, but I think that you will understand that if we get to reading parts of the transcript, perhaps we ought to read the entire transcript because there may be some parts that are read and consequently the parts not read wouldn't be fresh in the minds of the jurors like the parts that are read to the jury.

So with that explanation the Court is going to ask the jury to retire again and to recall this evidence for itself, and I think you can recall it for yourself, but I think the Court has a definite recollection about this evidence and I am sure that you all have definite recollections about the evidence, and I think that if you can thrash it out along with the other evidence that is in the case and come

to a verdict as to each one of these counts in the indictment [fol. 1854-1864] it would be better to do it that way.

So with that explanation the Court would ask the jury to retire again and reconsider the four counts of this indictment on trial here.

(Whereupon, at 3:12 o'clock p.m. the jury retired to resume its deliberations.)

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[fol. 1865] Mr. Starkey:

Parenthetically, I would also inform the court that it is the government's information that the defendant Aiken was the author of the threats which were referred to in the testimony in this case, and of which the Court has more than ample knowledge at this point.

The Court: What is the basis of that information?

Mr. Starkey: The basis of the information, your Honor, is that it was the opinion of the Witness Colson, the one [fols. 1866-1880] who was successfully intimidated, and the one who was threatened to the point where he categorically refused to testify for the government, that the source of these threats was the defendant Leonard Royal Aiken.

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[fol. 1881] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

C 156-56

UNITED STATES OF AMERICA,

v.

WINSTON MASSIAH, Defendant.

INDICTMENT—Filed May 28, 1958

The Grand Jury charges:

On or about the 6th day of May, 1958, in the Southern District of New York, Winston Massiah, the defendant, unlawfully, wilfully and knowingly did bring on board, had in his possession or control on board a vessel of the United States, while engaged on a foreign voyage, a narcotic drug; to wit, approximately 3 pounds, 8 ounces, and 256 grains of cocaine, not constituting a part of the cargo entered in the manifest or part of the ship stores.

(Title 21, United States Code, Section 184a)

——, ——, Foreman.

Paul W. Williams, United States Attorney for the Southern District of New York.

[fol. 1882] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

C 159-216

UNITED STATES OF AMERICA,

v.

WINSTON MASSIAH and JESSE COLSON, Defendants.

INDICTMENT—Filed July 20, 1959

The Grand Jury charges:

On or about the 6th day of May, 1958, in the Southern District of New York, Winston Massiah and Jesse Colson, defendants, did unlawfully, wilfully and knowingly bring on board, and have in their possession and control on board a vessel of the United States, to wit, the S.S. Santa Maria, while engaged on a foreign voyage, a narcotic drug, to wit, approximately 3 pounds, 8 ounces and 256 grains of cocaine, not constituting a part of the cargo entered in the manifest or part of the ship's stores.

(Title 21, United States Code, Section 184a and Title 18, United States Code, Section 2.)

[fol. 1883] Count Two

1. From on or about the 1st day of January 1957, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, and elsewhere, Winston Massiah and Jesse Colson, the defendants, and Fadul Rene Harb Huasaff, named as a co-conspirator but not as a defendant, and diverse other persons to the Grand Jury unknown, did unlawfully, wilfully and knowingly combine, confederate, conspire and agree together and with each other to commit certain offenses against the United States, to wit, to violate Sections 173 and 174 of Title 21, United States Code.

2. It was a further part of said conspiracy that Winston Massiah and Jesse Colson, defendants herein, would unlawfully, wilfully, and knowingly import and bring nar-

cotic drugs into the United States, in violation of Sections 173 and 174 of Title 21, United States Code.

3. It was a further part of said conspiracy that Winston Massiah and Jesse Colson, defendants herein, would unlawfully, wilfully and knowingly receive, conceal, possess, buy, sell and facilitate the transportation, concealment and sale of narcotic drugs, the exact amount and nature thereof being to the Grand Jury unknown, after said narcotic drugs had been imported and brought into the United States contrary to law, and knowing that said narcotic drugs had been imported and brought into the United States contrary to law, in violation of Sections 173 and 174 of Title 21, United States Code.

Overt Acts

In pursuance of said conspiracy and to effect the objects thereof, in the Southern District of New York, and elsewhere, the following overt acts were committed:

[fol. 1884] Count Three

1. From on or about the 1st day of January 1957, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, Winston Massiah and Jesse Colson, the defendants, and Fadul Rene Harb Huasaff, named as a co-conspirator but not as a defendant, and diverse others to the Grand Jury unknown, did unlawfully, wilfully and knowingly combine, confederate, conspire and agree together and with each other to commit certain offenses against the United States, to wit, to violate Section 184a of Title 21, United States Code.

2. It was a part of said conspiracy that Winston Massiah and Jesse Colson, defendants herein, would unlawfully, wilfully and knowingly bring on board, and have in their possession and control on board vessels of the United States, while engaged on foreign voyages, narcotic drugs not constituting a part of the cargo entered in the manifest or part of the stores of said ships, in violation of Section 184a of Title 21, United States Code.

Overt Acts

In pursuance of said conspiracy and to effect the objects thereof, in the Southern District of New York, and elsewhere, the following overt acts were committed:

1. In or about the month of October 1957, aboard the vessel S. S. Santa Maria, the defendant Jesse Colson had a conversation with a man.

2. In or about the month of December 1957, the defendant Jesse Colson had a conversation with a man in the vicinity of Ninth Avenue and 17th Street, New York, New York.

[fol. 1885] 1. In or about the month of October, 1957 aboard the vessel S. S. Santa Maria, the defendant Jesse Colson had a conversation with a man.

2. In or about the month of December, 1957, the defendant Jesse Colson had a conversation with a man in the vicinity of Ninth Avenue and 17th Street, New York, New York.

3. On or about the Spring of 1958, the defendant Jesse Colson had a conversation with a man in the vicinity of Ninth Avenue and 17th Street, New York, New York.

4. In or about the month of May 1958, aboard the vessel S. S. Santa Maria, the defendant Winston Massiah had a conversation with a man.

5. On or about the 6th day of May 1958, in the Southern District of New York, the defendant Winston Massiah was in possession and control of a certain quantity of adhesive tape on board the vessel S. S. Santa Maria.

6. In or about August 1958, in the Southern District of New York, the defendant Jesse Colson had a conversation with a man in the vicinity of 12th Avenue and 24th Street, New York, New York.

(Title 21, United States Code, Section 174)

[fol. 1886] 3. On or about the Spring of 1958, the defendant Jesse Colson had a conversation with a man in the vicinity of Ninth Avenue and 17th Street, New York, New York.

4. In or about the month of May 1958, aboard the vessel S. S. Santa Maria, the defendant Winston Massiah had a conversation with a man.

5. On or about the 6th day of May 1958, in the Southern District of New York, the defendant Winston Massiah was in possession and control of a quantity of adhesive tape aboard the vessel S. S. Santa Maria.

6. In or about May 1958, in the Southern District of New York, the defendant Jesse Colson had a conversation with a man in the vicinity of 12th Avenue and 24th Street, New York, New York.

(Title 18, United States Code, Section 371)

——— ———, Foreman.

S. Hazard Gillespie, Jr., United States Attorney.

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No. 159

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Docket No. 21733

UNITED STATES OF AMERICA,

Appellee,

—v.—

LEONARD ROYAL AIKEN,

Appellant.

BRIEF AND APPENDIX FOR THE UNITED STATES OF AMERICA

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United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

– v. –

LEONARD ROYAL AIKEN,
Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

This is an appeal by Leonard Royal Aiken from a judgment of conviction entered on June 29, 1961 in the United States District Court for the Southern District of New York, after an eleven-day trial before the Honorable J. Skelly Wright and a jury.

The indictment was filed on March 3, 1961 and charged in the Eighth Count that appellant Leonard Royal Aiken, named therein as "John Doe, a/k/a 'Leon'", with a certain physical description, had conspired to violate the Federal narcotics laws, Title 21, United States Code, Sections 173 and 174, together with co-defendants Winston Massiah, Jesse Colson, Mitchell Anfield, Granville Smith, Noel Maxwell, William Adams, John Henry Purry, Clarence White, Nick Holiday, Icky Thorn and Sylvia Ferris, and with various persons who were named as co-conspirators but not as co-defendants, and other persons to the Grand Jury unknown. The conspiracy related to the importation of cocaine from Chile and its distribution in

the United States between January 1, 1956 and March 3, 1961.

The Eighth Count was the only count which named appellant. Count One of the indictment charged that on or about May 6, 1958 Massiah, Colson and Anfield unlawfully possessed a narcotic drug on board a United States vessel, in violation of Title 21, United States Code, Section 184a and Title 18, United States Code, Section 2. Count Two charged that the same three defendants unlawfully imported, received, concealed, bought, sold and facilitated the transportation, concealment and sale of narcotic drugs on or about May 6, 1958, in violation of Title 21, United States Code, Sections 173 and 174. Count Seven charged that on or about May 6, 1958 Massiah, Colson and Ferris possessed and dealt with narcotics not in the original stamped package, in violation of Title 26, United States Code, Sections 4701, 4703, 4704(a), 4771(a) and 7237(a).

Counts Three, Four, Five and Six made charges against persons who did not stand trial with appellant, and thus are not relevant here.

In the instant trial Massiah, Anfield, Thorn and appellant Aiken were the defendants, and on June 29, 1961 the jury found all four guilty on the Eighth Count, the consiracy count.* Massiah was also found guilty on three substantive counts (One, Two and Seven).

---

* Jesse Colson pleaded guilty to Counts One, Two, Seven and Eight. The cases of the defendants Noel Maxwell, William Adams, John Henry Purry, Clarence White and Sylvia Ferris have been severed and are awaiting trial. The defendants Granville Smith and Nick Holiday are fugitives and have not pleaded to the indictment.

On June 29, appellant was sentenced as a second narcotics offender to thirteen years imprisonment. He is presently enlarged on $50,000 bail.

Statutes and Rule Involved

Title 21, Section 173

U. S. Code

173. *Importation of narcotic drugs prohibited; exceptions; crude opium for manufacture of heroin; forfeitures.* It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported and brought into the United States or such territory under such regulations as the Commissioner of Narcotics shall precribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.

Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any

narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the Commissioner of Narcotics and in his discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes. (Feb. 9, 1909, ch. 100, §2, 35 Stat. 614; Jan. 17, 1914, ch. 9, 38 Stat. 275; May 26, 1922, ch. 202, §1, 42 Stat. 596; June 7, 1924, ch. 352, 43 Stat. 657; June 14, 1930, ch. 488, §3, 46 Stat. 586.)

TITLE 21, SECTION 174

U. S. CODE

§174. Same; penalty; evidence.

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of

the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

For provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954. (As amended July 18, 1956, ch. 629, title I, §105, 70 Stat. 570.)

TITLE 18, SECTION 371

U. S. CODE

§371. *Conspiracy to commit offense or to defraud United States.*

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

RULE 30, FEDERAL RULES OF CRIMINAL PROCEDURE

INSTRUCTIONS

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time

copies of such requests shall be furnished to adverse parties. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

Questions Presented

1A. Whether appellant may object to the manner in which the lower Court charged on an element of the conspiracy, when appellant made no objection below nor submitted any requests to charge on this point.

1B. Whether the Court charged that the Government had to show appellant's knowledge that narcotics had been illegally imported and whether there was sufficient evidence to support the conviction under that charge.

2. Whether the lower Court properly admitted evidence that at the time of appellant's arrest appellant had attempted to avoid prosecution by offering illegal business opportunities to the arresting agent.

3. Whether the lower Court correctly denied a belated request to charge, which had already been covered, which was ambiguous, and which related to an issue on which there was no evidence before the jury.

Statement of Facts

The conspiracy

Winston Massiah and Jesse Colson began to import cocaine illegally in 1956, while they were working as merchant seamen with the Grace Line. They obtained the cocaine in Chile and smuggled it ashore in New York through longshoremen (G.1a-G.28a).* In the fall of 1956, a Mitchell Anfield, who also was a seaman, joined the conspiracy as an importer (G.28a-G.30a). Co-conspirator Icky Thorn (30a, 55a-59a) and appellant purchased cocaine in large quantities from the seamen. The Government showed at least twelve illegal importations of narcotics by the seamen (G.1a-G.30a, 38a-47a, 161a) and seven purchases by appellant (21a-60a). Appellant purchased cocaine in quantities varying from a half ounce on the first purchase (at a cost of $300) to a kilogram on two of his last purchases (at a cost of approximately $12,000 each).

Appellant joins the conspiracy—sale of ½ ounce in the fall of 1957

In the fall of 1957, Jesse Colson, who was then actively importing cocaine, had a conversation with a person named Leon "Schoolboy" Ellis, while riding in an automobile. Ellis said that he had heard that Colson was bringing in cocaine and that he (Ellis) would like to work for him. Colson replied that if Ellis got a customer, he should then contact Colson (21a).

Ellis then went out to look for customers. He was approached by a man named Tillie, who said to him, "Man, you are riding around with the man bringing the good coke in." Ellis answered, "Yes, that's my man." Tillie

* References with the prefix "G." are to the Government's appendix. All other references are to appellant's appendix.

then asked Ellis to get him some narcotics, and Ellis quoted Tillie the price of $50 a spoon (123a). Tillie told Ellis that he had $300 for this purchase (22a).

Ellis contacted Jesse Colson. No arrangements were made at first, because Ellis said that Tillie wanted to go to Colson's house to receive the cocaine and Colson refused to deliver under those circumstances. Shortly after, however, Tillie gave Ellis $300, for which Ellis obtained a half ounce of pure cocaine from Colson (23a). Ellis met Tillie in a bar and the two of them went to a building on West 141st Street, between Seventh and Eighth Avenues (23a-24a).

Ellis and Tillie entered an apartment where they were soon joined by appellant, whom they knew as "Leon" (25a).* Appellant asked Tillie if he had the narcotics. Tillie, who had been carrying the cocaine which Ellis had delivered, then gave the cocaine to appellant. Appellant measured the cocaine, said it was a little short, and asked Ellis to contact his supplier. Ellis said that he could not do so and appellant told him to forget it. Appellant asked Ellis to deliver the cocaine to a point on 136th Street, for which he paid Ellis $15 (26a).

Sale of 10-12 ounces in January 1958

In January of 1958, Jesse Colson told Ellis that he had a package of 10 to 12 ounces of cocaine which he wished to sell in one lot at a wholesale price. Ellis discussed this offer with appellant who said that he would take the whole lot if it was pure. Ellis checked with Colson, and reported

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* Ellis was called "Schoolboy" by the persons who dealt with him. The name "Leon" was also used for appellant by Colson, the one who identified appellant, and was the only name by which Colson knew appellant (325a-326a).

to Aiken that it was pure, and that it would cost $5,000. The next night appellant gave Ellis $5,000 in advance. When Ellis took the money to Colson, however, it developed that co-conspirator Icky Thorn needed cocaine for a customer of his. Colson thereupon decided to give half the shipment to Thorn and half to Ellis for delivery to appellant. Ellis delivered his cocaine to appellant and returned $2500 (30a-31a).

Sales to appellant by the importers

In about the third week of January, 1958, Colson told Ellis that he would like to meet Aiken, because "he seemed like a big man" (32a). Ellis arranged a meeting in a bar and introduced Colson and appellant, who then had a conversation which Ellis did not hear.

Ellis left New York because of a death in his family and was away during the end of January and most of February, 1958. When he returned to New York, Colson reported that he and co-conspirator Mitchell "Duke" Anfield had sold the last of their cocaine to appellant while Ellis was away (33a). Ellis also had a conversation with Anfield, who said that he was angry at Colson, whom he accused of cheating. In March Ellis met Anfield walking on 140th Street with a package which Anfield said was for delivery to the appellant. Anfield made the delivery and gave Ellis $75 (36a).

Sale of one kilo in September 1958

In May of 1958, the cocaine importation was stopped because Customs Agents in New York City seized a shipment which co-conspirator Massiah had brought on the S.S. Santa Maria. The traffic did not resume until Sep-

tember, when two Chileans brought cocaine to Colson at his home (38a-39a, 161a-162a). Ellis went to Colson's home, where he watched the delivery of cellophane packages containing cocaine and helped Colson place the cocaine in two large jars. Colson told Ellis to take a sample to appellant and to tell him that "everything was all right" (39a).

Ellis did so and appellant asked what the price would be. Ellis said that appellant could get anything that he wanted. Appellant replied that he wished to see Colson and talk about the price. Approximately 3 or 4 days after this, Colson told Ellis that he had arranged a price with appellant and that on the following night he was going to deliver a kilo of cocaine to appellant. Approximately 2 or 3 days after this conversation, Colson and Ellis met appellant on the street and delivered the cocaine. Appellant told him to give the package to a man named Mersh who was present (44a). Ellis left and Colson later told him that appellant had paid $12,000 for the cocaine.

Sale of one kilo in October 1958

In October, another shipment of cocaine was delivered to Colson's home by two Spanish speaking persons, one of whom had participated in the earlier delivery. Ellis again helped Colson transfer the cocaine to jars and again Colson gave him a sample to take to appellant. Appellant told him that he had to raise some money (41a). A couple of days later, Colson told Ellis that he was going to deliver a kilo to appellant that night. The two of them went to a place where they kept the cocaine and then met appellant on 136th Street. Colson told Ellis

to give appellant the jar of cocaine and he did (40a). Appellant and Colson left to get the money and later Colson told Ellis that appellant had given him $12,000 (49a). Ellis received 10% commission on both deliveries (52a-53a).

Seventh sale

About the end of October or early November, appellant and Ellis went to a hotel in the area between West 115th and West 119th Street, in Manhattan, where Icky Thorn was living. When they arrived, Jesse Colson was also there. After a conversation between Colson and appellant, which Ellis did not hear, Colson taped up a jar containing a white substance, and told Ellis to take it to 136th Street. Appellant instructed Ellis to deliver the jar to Mersh, and Ellis did so (56a-59a).

Appellant's Arrest

In the summer of 1959 Colson was arrested and identified appellant as an important customer whom he knew only as "Leon" (321a-322a). He also gave a description of appellant which was used to identify Aiken in the indictment (307a-308a).* Appellant was indicted in March of 1961 and a "John Doe" bench warrant issued.

On May 13, 1961 Customs Agent Finbarr Murphy arrested appellant on the bench warrant, at which time

* In November, Government agents also learned of Leon (Schoolboy) Ellis (327a-328a) whom Colson described as "Schoolboy", a person engaged in the conspiracy, distinct from "Leon" (Aiken) (326a). Leon "Schoolboy" Ellis was arrested on a related charge in April of 1961, after the instant indictment had been returned, but was not included in this indictment.

Aiken admitted that he was known as "Leon", and that he had known a person named "Schoolboy" for the past two or three years. Appellant was then arraigned and remanded in lieu of bail.

Agent Murphy drove appellant to the Federal House of Detention, and just before they got out of the agent's car the two men had a conversation which appellant now attacks as inadmissible. Murphy told Aiken to get out of the car, and said that he was going to place him in the Federal House of Detention. Aiken began to sweat and the left side of his face was twitching. When Murphy repeated his command Aiken said "Wait a minute". Murphy answered, "Why?" Aiken said, "If you get any stuff you want to get rid of, call me." The rest of this conversation, as testified to by Murphy, is set forth in the margin.*

---

* "I said to him, 'I can trust you? Do you know who I am?'
He said, 'Yes'. I said, 'Well, as of last night I never even met you.'
He says 'Don't worry. You can trust me.'
I said, 'I don't work like that. If I am going to work with you, I've got to know who you are doing business with.'
He said, 'What do you mean?'
I said, 'Well, I have a lot to lose here.'
So I told him, 'I've got to have references. Give me some people that I can check up.' I said, 'I got to have references of people that have done business with you before, before I go into anything with you.'
And this conversation terminated, and I took him into the Federal House" (300a).

The Trial

At the trial Leon "Schoolboy" Ellis testified to the sales and deliveries which he made to appellant (19a-60a). Agent Murphy testified to his conversation with appellant at the time of the latter's arrest (297a-300a). Neither appellant nor any other defendant took the stand or offered any evidence by way of defense.

POINT I

This Court should reject appellant's objection to the manner in which the lower Court charged on an element of the conspiracy, since no objection was made below, since the jury was properly charged on all elements of the conspiracy and since the jury's verdict was supported by substantial evidence.

Appellant argues that the Trial Court erred in telling the jury that the conspiracy of which he was convicted was charged under Section 371 of Title 18, rather than Sections 173 and 174 of Title 21, United States Code. Appellant contends more specifically that the Court thereby omitted to charge on an essential element of the conspiracy, relating to the appellant's knowledge that the narcotics involved in the conspiracy were illegally imported. Appellant concedes, however, that he made no objection to this part of the Trial Court's charge, and the record is clear that he submitted no requests for a different charge.

The Government contends: (A) Appellant's failure to object to this part of the charge bars him from raising this

ssue on appeal, under Rule 30, Federal Rules of Criminal Procedure. (B) The Trial Court in fact did charge on the necessity of finding knowledge of illegal importation, and there was sufficient evidence to support the jury's finding that appellant had such knowledge. In addition, the statutory presumption from possession was before the jury, and there was sufficient evidence of possession to support the application of the presumption. In connection with these contentions, the Government also submits that not only was there substantial evidence of possession, but, in addition, the jury, by its verdict, necessarily found that appellant possessed narcotics, and there was no defense evidence to explain this possession. *Cf. United States* v. *Gillette*, 189 F. 2d 449 (2d Cir.), *cert. denied*, 342 U.S. 827 (1951).

The Court's Charge

The Court charged the jury first on the three substantive counts and, thereafter, on the conspiracy count.

While charging on a substantive count under Title 21, United States Code, Section 174, the Court explained the presumption which arises from possession of narcotics (348a). The Court then turned to the conspiracy count. The Trial Judge read a sentence from the general conspiracy statute, Title 18, United States Code, Section 371: "If two or more persons conspire to commit any offense against the United States, and one or more of such persons do any act to effect the object of the conspiracy, each shall be punished as provided by law" (350a). He stated that this was the offense charged. The conspiracy actually was charged under Sections 173 and 174 of Title 21, as the jury was later informed when the indictment was sent into the jury room, at the jury's request (363a).

The Court went on:

> "The conspiracy alleged in this indictment is to violate Sections 173 and 174 of Title 21, and the pertinent parts of those statutes read:
>
> "It is unlawful to import or bring any narcotic drug into the United States except such amounts as the Commissioner of Narcotics finds to be necessary for medicinal purposes. Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of such narcotic drug after importation, knowing the same to have been imported illegally, or conspires to commit any such action in violation of the laws of the United States, shall be punished" (350a-351a).

The Trial Court then defined conspiracy and what constitutes participation in a conspiracy. In this regard he said:

> "Before a jury may find that a defendant or any other person has become a member of a conspiracy the evidence must show . . . that the defendant or other person who is claimed to have been a member knowingly and wilfully participated in the unlawful plan with the intent to advance and further some object or purpose of the conspiracy" (352a).

No objections were made to this charge nor were any requests submitted by appellant for a different charge.

A. Rule 30 of the Federal Rules of Criminal Procedure Expressly Prohibits Appellant from Assigning as Error the Court's Charge, When He Neither Made Objection at Trial Nor Requested Any Other Charge on This Issue.

Rule 30, Federal Rules of Criminal Procedure, provides in part:

> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests . . . *No party may assign as error any portion of the charge or omission therefrom unless he objects thereto* before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." (emphasis added)

This rule is clear and applies here. *United States* v. *Cioffi*, 253 F. 2d 494, 496 (2d Cir. 1958); *United States* v. *Bando*, 244 F. 2d 833, 844 (2d Cir.), *cert. denied*, 355 U.S. 844 (1957); *United States* v. *Sherman*, 171 F. 2d 619, 624 (2d Cir. 1948).

The rule has particular application where, as here, the appellant's objection is of a hypertechnical nature and relates to an element of proof on which the Government's evidence was overwhelming, as will be shown below.

B. The Trial Court Charged on Knowledge of Illegal Importation and the Jury Had Sufficient Evidence from Which to Find Such Knowledge.

Assuming that this Court should reach the merits of appellant's argument on this point, the Government submits that the Trial Court in fact did charge on all elements of the conspiracy, including knowledge of illegal importation, and that there was evidence of all elements to support the verdict.

1. The Trial Court Charged on Knowledge of Illegal Importation.

The Trial Court charged the jury that the objects of the conspiracy were to violate a statute prohibiting (1) illegal importation of narcotics, and (2) the performance of certain acts with respect to narcotics, knowing the same to have been illegally imported (350a-351a). The Court also charged that one could not be a member of the conspiracy unless he knowingly and willfully intended to advance and further some object or purpose of the conspiracy (352a). The plain meaning of these two statements, taken together, is that to be convicted of the conspiracy charged here, appellant must have conspired either to import narcotics illegally or to deal in narcotics, knowing them to have been illegally imported.

2. There Was Sufficient Evidence to Support Appellant's Conviction Under the Trial Court's Charge.

Knowledge of illegal importation, of course, need not be shown solely through the statutory presumption arising from proof of possession. In *United States* v. *Santore*, 290 F. 2d 51, 76, 81, 82 (2d Cir. 1960), *cert. denied*, 365

U.S. 834 (1961), a majority of the judges, sitting *in banc*, found that knowledge of illegal importation was sufficiently shown for two defendants, Casella and Santore, by a statement which Casella had made in Santore's presence that he could supply heroin "in amounts anywhere from half a kilo to a ton . . . with quality just as it comes off the boat." Judges Lumbard, Moore, Friendly, and Smith, stressing the reference to "off the boat," found that this showed knowledge of illegal importation.

In the instant case, proof of appellant's knowledge was at least as strong and was shown by two types of evidence. First, here there was substantial evidence that appellant possessed large quantities of narcotics. Aside from the statutory presumption, reason and experience permit an inference that one possessing narcotics knows that they have been illegally imported. It is generally known that narcotics are not of domestic origin and "cannot be brought into this country at all, except under regulations for medicinal use." *Yee Hem* v. *United States*, 268 U.S. 178, 184 (1925). See *United States* v. *Savage*, 292 F. 2d 264 (2d Cir. 1961). These inferences apply to the importation of cocaine. *Hooper* v. *United States*, 16 F. 2d 868 (9th Cir.), *cert. denied*, 274 U.S. 743 (1926).

Second, there was evidence from which the jury could have inferred that appellant knew that he was dealing with imported narcotics. In judging the sufficiency of the evidence on appeal, it must be viewed most favorably to the Government. *United States* v. *Tutino*, 269 F. 2d 488, 490 (2d Cir. 1959); *United States* v. *Morris*, 269 F. 2d. 100, 103 (2d Cir.), *cert. denied*, 361 U.S. 885 (1959). Ellis testified that in the fall of 1957, he arranged to sell narcotics for Jesse Colson (20a), who he knew was a seaman, and who was bringing in narcotics on his voyages (93a). He said that he rode in a car with Colson (20a). After

his talk with Colson, Ellis met a man named "Tillie" who said to him, "Man, you are riding around with the man bringing the good coke in." Ellis answered, "Yes, that's my man." Tillie said, "What about getting me some?" Ellis answered, "Yes . . . if you get some dough." (123a)

Shortly thereafter, Tillie gave Ellis $300 and Ellis obtained cocaine from Colson. He met Tillie and the two of them went to an apartment on West 141st Street. Appellant arrived and asked Tillie if he got the stuff (26a). Tillie then handed to appellant the cocaine which Ellis had obtained from Colson.

Thus Tillie, the man who was buying cocaine for appellant, stated that he knew he was dealing with men who were "bringing the good coke in." This reference to importation is much like the reference to "off the boat" in *Santore*. Viewed most favorably to the Government, this evidence leads to the inference that appellant, who was the actual buyer, knew as much about the source of the cocaine as his contact man, Tillie.

In addition, the evidence showed that appellant was considered a large dealer in narcotics and a major part of the conspiracy. In the words of Ellis and Colson, he was a 'big man". Moreover appellant handled large quantities of narcotics, often in pure form. He knew the actual importers, Colson and Anfield, and dealt directly with them on two occasions. On other occasions, the only intermediary was Ellis. Appellant was the first one to be contacted when the seamen resumed importing during the fall of 1958, after supplies had been cut off by the seizure of Massiah's cocaine on the S.S. Santa Maria. He was then offered cocaine in kilo lots and paid $12,000 for each lot.

If the inferences from this evidence, including the evidence of appellant's possession, are drawn favorably to the Government, the Government's proof of appellant's knowledge is at least as strong as that deemed sufficient by a majority of this Court in *Santore*.

3. The Statutory Presumption Was Before the Jury.

It should be recognized, moreover, that the statutory presumption from possession was before the jury. The Trial Court told the jury, when charging on Count Two, a substantive count:

"Under the law possession of narcotics gives rise to an . . . inference that the person in possession had knowledge of . . . unlawful importation" (348a). This was not repeated during the charge on the conspiracy count, but appellant made no objection or request for an additional charge. It also is true that the Court had stated that this presumption applied to prosecutions for violations of Section 174, and that the jury did not know that the conspiracy was charged under Section 174 until it sent for the indictment (363a). The presumption, however, was certainly before the jury, and, on the whole record, it was accurately stated. Since there was strong evidence of appellant's possession of narcotics to support the application of the presumption, which was before the jury, no error was committed.

* * * *

In connection with the above arguments, it should be noted that there not only was substantial evidence that appellant possessed narcotics during the conspiracy, but the jury, by its verdict, necessarily had to find such possession. The evidence of possession constituted such a

central part of the Government's case that the jury must have believed it in order to reach its verdict on other elements of the offense. This may be seen through analysis of the conspiracy charge and of the jury's verdict.

The trial court instructed the jury that to convict appellant of the conspiracy, it had to find four things: (1) That a conspiracy existed at the time alleged; (2) that appellant knowingly became a member of the conspiracy; (3) that an overt act was committed; and (4) that the overt act was in furtherance of the conspiracy (355a). When the jury found appellant guilty of conspiracy, they necessarily found all of these elements, "unless they disregarded the instructions, which we may not assume." *United States* v. *Gillette, supra,* 189 F. 2d at 454.

Thus the jury necessarily found that appellant knowingly became a member of the conspiracy, since this was one of the elements charged. The sole evidence on which the jury could have reached this conclusion was the testimony of Leon Ellis, who said that on seven occasions cocaine had been sold and delivered to appellant. Unless the jury believed Ellis, it had no basis for reaching its conclusion that appellant participated in the conspiracy.*

If the jury believed Ellis, it must have found that appellant possessed narcotics, for the sum total of Ellis' testimony with respect to appellant was a report of sales and deliveries of narcotics. In each and every case, narcotics were delivered to appellant or to a person under appellant's immediate control. The jury could not have inferred anything from Ellis' testimony unless they believed that these transactions took place. Since they inferred that appellant participated in the conspiracy,

* Agent Murphy's testimony went solely to the question of appellant's consciousness of guilt. It did not show participation in the conspiracy.

they must have found that these transactions took place. A finding that these transactions took place, finally, is the same as a finding that appellant possessed narcotics, for in each transaction, narcotics were put into his hands or under his control.*

Conclusion of Point I

In conclusion, the circumstances here make the requirements of Rule 30 particularly applicable. At best, appellant's objections, made for the first time on appeal, are directed to the manner of presentation, rather than the substance of the charge. The jury was charged to find that appellant knew that the narcotics involved in the conspiracy were illegally imported. The extent of importation by the conspirators and appellant's participation in the conspiracy as well as his actual possession of large quantities of pure narcotics makes the conclusion of his knowledge almost inescapable. In any event the evidence was far from insufficient, viewing the evidence most favorably to the Government. Moreover, the jury necessarily found that appellant had possession of narcotics,

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* The jury, by its verdict on Counts 1, 2 and 7, also found possession of narcotics by appellant's co-conspirator Massiah during the operation of the conspiracy with appellant. In *United States* v. *Santore, supra*, 290 F. 2d 51, Judge Lumbard said:

> "Both this court and others have, in the past, assumed that any principal who knows of the operation of the conspiracy is impressed with the presumption of §174 even without any evidence of physical or constructive possession. See *United States* v. *Morris*, 2 Cir., 1959, 269 F. 2d 100, *certiorari denied* 1959, 361 U. S. 885 . . . ; *United States* v. *Alexander* 7 Cir., 1955, 219 F. 2d 225." 290 F. 2d 51, 78.

He further indicated that this presumption is raised through possession by one conspirator during the conspiracy, and is raised for all conspirators who know of the operation of the conspiracy. The different test stated by Judge Clark in *United States* v. *Hernandez*, 290 F. 2d 86, 90 (2d Cir. 1961) is met by the argument in the text.

and it had before it the statutory presumption which permits the inference of such knowledge from the fact of possession. In these circumstances, there was manifestly no error.

POINT II

The Trial Court properly received evidence that appellant had attempted to avoid prosecution by offering illegal business opportunities to a federal agent.

The Lower Court's Ruling

The Government proved that at the time of appellant's arrest and just before the arresting agent was to place him in the Federal House of Detention appellant offered the agent illegal opportunities in the narcotics business. When this conversation was offered in evidence appellant objected on the ground that the evidence was not shown to be in furtherance of the conspiracy and was prejudicial. The Court said that even though the offered conversation was not in furtherance of the conspiracy it was admissible against appellant Aiken. The Court referred to a memorandum of law which it had received from the Government, which showed authority for admitting such evidence to show consciousness of guilt. The Court received the evidence and instructed the jury to consider the evidence against appellant alone. Appellant now argues that the evidence was inadmissible and that the Court's ruling constituted reversible error.

Evidence of Appellant's Offer to the Agent Was Admissible.

This Court has held squarely that where a defendant offers something of value to a Government agent for the purpose of effecting settlement of a criminal prosecution, evidence of that offer is admissible to show consciousness of guilt. *United States* v. *Picarelli*, 148 F. 2d 997 (2d Cir.), *cert. denied* 326 U.S. 722 (1945); *DiCarlo* v. *United States*, 6 F. 2d 364, 368 (2d Cir.), *cert. denied*, 268 U.S. 706 (1925). This view also has been taken by the commentators. 4 *Wigmore, Evidence*, §1061(8) (3d ed. 1940); 1 *Wharton's Criminal Evidence*, §140 (12th ed. 1955).

In *Picarelli* this Court said:

> "On the way to the police station, Picarelli pulled his car to the curb and said to the policeman, 'Listen, Officer, can't we talk this thing over?' No innocent explanation of this inquiry being vouchsafed, we think the effort to effect a settlement may be regarded as evidencing consciousness of guilt. Christian v. United States, 5 Cir., 8 F. 2d 732, 733; 4 Wigmore, Evidence, 3rd Ed., p. 31." 148 F. 2d at 998.

The rationale for admitting this evidence has been stated by Wigmore:

> "(8) In a criminal prosecution, the accused's offer to pay money or otherwise to 'settle' the prosecution will be received against him, because that mode of stopping or obstructing the prosecution would be an unlawful act, and good policy could not encourage that mode of dealing with a criminal charge; hence such an offer is receivable for whatever inference may be

drawn from it; subject, of course, to the accused's explanation." 4 *Wigmore, Evidence* §1061(8) (3d ed. 1940).

Whether or not the conspiracy had terminated before the time of this conversation is irrelevant, moreover, since the evidence was not admitted as an act in furtherance of the conspiracy.

Incidental disclosure of another crime by this testimony is not sufficient ground for excluding it, since the evidence was otherwise admissible for a proper and relevant purpose——to prove consciousness of guilt. *United States* v. *Smith*, 283 F. 2d 760 (2d Cir. 1960), *cert. denied* 365 U.S. 851 (1961); *United States* v. *Eury*, 268 F. 2d 517 (2d Cir. 1959); *United States* v. *Picarelli, supra.*

POINT III

The Trial Court properly denied appellant's request to charge on identity.

At the conclusion of the Court's charge, appellant asked the Court to charge the jury further that if "the evidence equally points to the possibility that the defendant named as Leon in the indictment might be Leon known as Schoolboy Ellis, or Leonard Royal Aiken, they must acquit." (359a) The Court denied this request and appellant now claims this was reversible error. The Court's ruling, however, was manifestly correct.

The short answer to appellant's claim of error is that, assuming *arguendo* that the request related to an issue

on which there was evidence before the jury,* the Court had already covered that issue in its charge. The Court had charged:

> "You must determine first whether the defendants on trial are the defendants named in the indictment." (356a)

Certainly this charge had covered any issue to which appellant's request could properly have been directed, and there was no abuse of discretion in declining to give a further charge.

The request itself also was defective because it was ambiguous. The jury could have interpreted it to mean that if the evidence showed that Ellis as well as appellant participated in the conspiracy they must acquit appellant. The Court could not have given a request in this form without confusing the entire case.

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* Actually there was no evidence before the jury on the question of whom the Grand Jury intended to indict. The indictment, which was applicable on its face to appellant, had been sufficient to bring him to trial. *United States* v. *Fawcett*, 115 F. 2d 764, 767 (3d Cir. 1940); *United States* v. *Pulver*, 1 F. Supp. 909 (E.D.N.Y. 1932), *aff'd* 61 F. 2d 1044 (2d Cir. 1932). Unlike the case of a removal proceeding, here the Federal Rules of Criminal Procedure do not place on the Government the affirmative burden of proving the defendant's identity before taking him to trial. Appellant did not raise the issue at arrest, on arraignment, or by motion before or during trial. He merely asked some questions on cross-examination, which themselves were not evidence and which had adduced no material evidence. As a result there was no evidence before the jury to which appellant's request could properly have been directed.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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APPENDIX

Excerpts from Testimony

(136) • • •

JAMES BARBER, called as a witness on behalf of the Government; being duly sworn, testified as follows:

Direct examination by Mr. Starkey:

Q. What is your occupation, Mr. Barber? A. Longshoreman.

Q. Do you know Winston Massiah? A. Yes, I do.

Q. When did you first meet him? A. In 1956.

Q. What part of the year? A. During the year.

Q. Do you see him in the courtroom? A. Yes, I see him behind you.

Q. Will you point him out, please? A. Behind the gentleman with the glasses on there.

Mr. Starkey: Let the record show that the witness has identified Winston Massiah.

The Court: What kind of shirt has he got on?

The Witness: A tan short, a brown shirt.

The Court: Let the record show that he identified the defendant Massiah.

Q. Where did you first meet Winston Massiah, Mr. (137) A. On the ship.

Q. What pier? A. Pier 58, North River.

Q. That is a Grace Line pier? A. That's right.

Q. Where have you worked as a longshoreman? A. What did you say?

Q. Where have you worked as a longshoreman? A. Me?

Q. Yes. A. I worked with M. P. Holly, 17 State Street. That was the office. And they had a contract with the Government during the war.

The Court: And where else?

The Witness: I worked for the United States at Pier 59, but for a short while. And I worked for Preston Stevedoring Company. At least he was the contractor.

Q. Have you been convicted of any crimes? A. I have, sir.

Q. What ones? A. I had an assault down South in 1937.

Q. Do you recall any others? A. Well, I——

(138)

The Court: You were convicted once for assault. Any other convictions?

The Witness: No.

The Court: Is that the only conviction?

The Witness: Walking in, and I worked in where there was gambling, and there was a raid.

The Court: And you were arrested in the raid?

The Witness: I was arrested and taken to enter a plea. I pleaded guilty and I paid $1 and got out.

Q. That was a gambling charge? A. Yes.

Q. And the word you used was "raid"? A. Yes.

Q. When you first met Massiah in the spring of 1956, did you have a conversation with him? A. I did so.

Q. What did he say and what did you say? A. He asked me did I want to take a package out for him and make some money, and I said, "Like what?" I said, "Whats in it?"

He said, "Don't worry about it."

Q. And this was aboard a Grace Line vessel? A. That's right.

Q. And what did you say then? (139) A. I told him I would meet him at eleven o'clock.

Q. And did you see him? A. I did so.

Q. What happened then? A. He gave me the package, and I walked to Eighth Avenue, and he walked in front of me.

Q. And then what happened? A. I walked into the men's room on the ship and I gave it to him.

Q. On the ship? A. I mean in the bar.

Q. And you gave him the package? A. That's right.

Q. Did you have any conversation at that time? A. He said he would see me later.

Q. And did you see him later? A. I did so.

Q. And what happened then? A. I was on the gangplank and he gave me some money.

Q. Did there come a time thereafter when you saw him again? A. Yes. About six weeks later.

Q. Was it another Grace Line ship at that time? A. That's right.

(140)

Q. And what was the conversation you had with him? A. Well, I met him in the hallway, and he said he had another package he wanted me to take off, and I told him I would meet him around about 9:30.

Q. And did you meet him? A. I did.

Q. What happened then? A. He gave me the package and I walked to the same bar and he was behind me.

Q. What happened at the bar? A. I gave him the package and he kept going. What was in it, I don't know.

Q. Did you have a conversation with him at that time? A. I didn't.

Q. Was there any talk about payment? A. Oh, he told me he would see me later on the ship.

Q. Did you see him later? A. I did.

Q. What happened then? A. He gave me some money but how much I don't remember.

Q. Now, did there come a time thereafter, Mr. Barber, when you met a man by the name of Jesse Colson?

(141)

Q. Who introduced you to him? A. Sonny.

Q. Who do you mean by Sonny? A. Winston.

Q. Winston Massiah? A. That's right.

Q. Where did he introduce you to him? A. In the sleeping quarters on the ship.

Q. What was the conversation at the time? A. He told me—he said that I was a friend of his and I was O.K.

Q. Was there anything else said? A. Colson told me to wait and he had a package for me to take off the ship, and I waited in the room, and he went and got it, and he brought it to me and I take it off the ship.

Q. What did you do with it then? A. I went down in the subway and gave it to him on the subway.

Q. Who did you give it to? A. To Jesse. To Jesse Massiah.

Q. You gave it to whom? A. To Jesse.

The Court: Jesse who?

(142)

The Witness: Colson.

Q. Did there come a time thereafter when you carried off a package and didn't get paid?

Mr. Carluccio: Objection, your Honor.

The Court: Don't lead the witness.

Mr. Starkey: I am sorry, your Honor.

The Court: Did this come to an end? Did this arrangement come to an end?

The Witness: Yes.

The Court: Tell the jury how it came to an end.

The Witness: On what occasion?

The Court: Did you stop carrying packages off the ship?

The Witness: I did so at that time but——

Mr. Starkey: Your Honor, if I may put this question:

Q. Did there come a time when it ended in so far as Winston Massiah was concerned? A. Yes.

Q. Will you tell the Court what happened at that occasion and right before it? A. Well, I——

Mr. Pogoda: May I at this time ask Mr. Starkey, through your Honor, whether this is under the conspiracy (143) count or under the Counts 1 and 2?

The Court: What is it, Mr. Starkey?

Mr. Starkey: This would be, I think, admissible only under the conspiracy count, your Honor.

The Court: Let us proceed.

Tell us what happened.

The Witness: At what occasion now?

Q. The last time you carried off a package for Winston, A. No, I never take anything else off for him.

Q. What happened on the last occasion? A. Which occasion are you speaking about now?

Q. The last occasion on which you carried off for Winston Massiah. A. Well, I didn't get any money.

Q. Well, how did that happen? You tell that to the Court and jury.

Mr. Carluccio: Your Honor, may I interject? Could he place the time on this last occasion?

The Court: When was this, about, do you remember?

The Witness: I do not.

The Court: Was it 1959, '58, '57 or '56?

The Witness: Honestly, I cannot remember what year it was now or what month.

(144)

Q. How long was it after you first met Winston, your best recollection? A. Well, you are asking me something that I cannot recall because I didn't remember the year and what month, or everything. I can't remember that.

Q. Well, you remember the year you first met him, don't you? A. I remember that, but I can't remember the year that was. I don't remember at the time.

The Court: About how long was it after you first met him? Was it a month, six months, a year?

The Witness: I don't want to sit up here and say something wrong that I don't know about. Maybe it was a year or something.

Q. What happened on this occasion, Mr. Barber, the one where you said you didn't get any money?

Mr. Carluccio: May he place not only the time but where this was, what ship, and so forth?

Mr. Starkey: I am asking the witness to give the whole story, the place and the conversations.

The Court: Just tell us what happened.

A. I am trying to tell you, your Honor, as best I can.

The Court: All right.

(145)

The Witness: I don't want to say something that I don't know what I am speaking about.

The Court: Just tell us.

A. The best I can remember would be possibly about a year.

The Court: And then what happened? Tell us all about it.

The Witness: Well, I only said I took the package off and I didn't get paid. That's all I can say.

Q. When did you first talk to him on this occasion about carrying the package off?

Mr. Somers: Talk to whom?

The Witness: Where did I first talk to him at?

Mr. Pogoda: To which defendant?

Q. The question was with reference to your breaking off with Massiah. That was the question. Now, you said that you didn't get any money the last time you took the package off. Now, we want to know all about that. Tell us where it was, and what happened, what he said to you and what you said to him. A. Well, I just said that I brought

the package off and he said that I would see him at his house.

Q. From where did you carry the package? A. To Eighth Avenue, in the bar.

(146)

Q. And where did you start? A. From aft of the No. 5 hatch.

Q. On the ship? A. Yes.

Q. And you had a conversation with him at that time? A. Not too much.

Q. Well, yes, but what was the conversation? A. He asked me would I take the package off of the ship.

Q. Yes: And what did you say? A. I said yes.

Q. O.K. Now, did there come a time then when you did? A. That was the time then.

Q. What did you do with the package? A. I gave it to him on Eighth Avenue in a bar.

Q. What did he say to you at that time? A. He said he would see me later at his house.

Q. And did you see him later? A. I did so.

Q. How much later? A. The following Saturday.

Q. Did you have a conversation with him then? (147)

A. (No answer.)

Q. At his house? A. Well, I only stayed there about five minutes.

Q. The question, Mr. Barber, was did you have a conversation with him?

The Court: What did he say? Tell us what happened at the house.

The Witness: He only told me, he said he didn't have any money because he was stuck up, and I only stayed there about five minutes and I walks out.

Q. Did you have any conversation at that time, any further conversation? A. Well, he introduced me to two guys. Who they was, I don't know.

Q. Did you see anybody else there that you knew? A. Anybody else excusing the two guys?

Q. Besides Winston Massiah and you. A. I am saying those two guys was there but I don't know who the fellows was. He introduced me to them but who they was, I don't know.

Q. Did you see anybody else there besides him and the two fellows? A. Well, Jesse Colson walks in.

Q. Did you have any conversation with him? (148) A. Only one word, that's all.

Q. What? A. He only said that I didn't believe that there was a stickup and I stood there a few minutes and I walks out.

Q. Was there any conversation other than that that you can recall? A. I can't remember now.

Q. You keep trying, Mr. Barber.

(Pause.)

The Court: Did he tell you when you would get your money?

The Witness: No, he didn't.

Q. Did Winston say what he meant by being stuck up? A. No, he didn't. I can't recall right now.

Q. Was there any conversation you can recall about the contents of the package? A. (No answer.)

Mr. Starkey: I ask the Court to direct the witness to answer the question.

The Court: I think he is trying to think. Suppose you answer the question now.

The Witness: Your Honor, if you will give me time to remember——

(149)

The Court: Sure.

The Witness: I have to try to remember.

The Court: Sure.

Mr. Pogoda: If the Court please, I think this witness has constitutional rights of which he should be advised.

The Court: Well, I think he ought to assert them for himself. I think it is your responsibility.

Suppose you answer the question?

The Witness: If I can recall it, I will.

Q. Mr. Barber, do you recall a conversation at that time about the contents of what was in the package you carried off? A. (No answer.)

Mr. Carluccio: You Honor, I join in the request that he be advised of his constitutional rights.

Mr. Starkey: Your Honor, I object.

Mr. Carluccio: It is the first time he has stated, or, that he will be stating that he knew what was in the package and it would be greatly to his detriment, your Honor.

Mr. Starkey: I object to comments of this kind by defendants' counsel.

The Court: I can understand your concern for (150) the witness and his constitutional rights, but you have a responsibility in connection with this witness's constitutional rights. Let us proceed.

Mr. Starkey: Your Honor, I ask at this time for permission to refresh the witness's recollection by leading.

James Barber—for Government—By the Court

The Court: Well, it is twenty-five minutes to five. We are going to recess this case until 10:30 tomorrow morning and the jury is under the same instructions now as it was at the luncheon recess. Don't discuss the case with anybody. If anyone attempts to discuss it with you, report the matter to the Court. You will report to the room in the rear of the courtroom at 10:30 tomorrow morning.

Let the jury step out, please.

(Jury excused.)

The Court: Now, Mr. Witness; you come back here at 10:30 tomorrow morning and you come directly here from home; do you understand that?

The Witness: Yes.

The Court: Do you understand what I am talking about?

The Witness: I understand.

The Court: All right.

(151)

Mr. Archer: May I say something to the Court?

With reference to the remand, your Honor, is the order of remand still in force?

The Court: The order of remand is still in force, yes.

Come straight here and don't stop at any of these bars on the way; do you understand?

The Witness: O.K.

The Court: This man is not in custody, is he?

Mr. Starkey: No, he is not.

(Adjourned to Friday, June 16, 1961, at 10:30 o'clock a.m.)

(152)

New York, June 16, 1961,
10:30 a.m.

(Trial resumed)
(Jury present.)

JAMES BARBER resumed.

The Court: Swear the witness again.

JAMES BARBER having been previously duly sworn, was resworn and testified further as follows:

Redirect examination by Mr. Starkey:

Q. Now, Mr. Barber, at the time that we recessed yesterday you were telling the Court and the jury about the conversation you had with Winston Massiah at his home. Do you recall that? A. Yes.

Q. When did that take place? A. In 1956.

Q. Do you recall when in '56? A. In the spring of the year.

Q. At his home? A. At his home? Yes, at his home.

(153)

Q. When did you meet Winston Massiah? A. 1956.

Q. When? A. On the ship.

Q. When in '56? A. In the spring of the year.

Q. Now when did you see him at his home? A. On a Saturday at noontime.

Q. And what was the conversation you had with him at that time? A. Well, he just told me that he didn't have any money, that the cocaine was taken away from him.

Q. That the what was taken away from him? A. The cocaine.

Q. Did he say anything else? A. Jesse walks in and he said like "I don't believe it" and I only stayed there a few minutes and I left.

Q. Did Jesse say anything when Winston said you didn't believe it? A. He said, "Yes, that's true."

Q. What did he say was true? A. That the cocaine was taken away from him.

Q. Now, when did that happen? A. In 1956.

(154)

Q. What part of '56? A. I would say as near as I can remember the spring of the year.

Q. You mean it happened at the same time you met Winston Massiah? A. No. It happened six months later.

Q. Six months after you met him? A. That's right.

Q. Well, then, that wouldn't be in the spring, would it? A. That would be in the spring. I said that is the best I could remember it was in the spring.

Q. I mean if it happened six months after you met him. A. That would be in the fall.

Q. Now, you testified that you had carried packages off for Jesse Colson. A. That's right.

Q. How many times did you do that? A. Only twice.

Q. When was the first time you carried off for him? A. Three months later, after I met Winston.

Q. And that was when you met Jesse? A. That is when I met Jesse.

(155)

Q. And when was the second time that you carried off packages for Jesse? A. About six weeks later.

Q. After the first time? A. Yes.

Q. Were these before or after the conversation at Winston's home when he told you about the stickup? A. Before.

Q. Do you know a man by the name of Sunny Hunter, or did you know a man by the name of Sunny Hunter? A. I know a fellow by the name of James Hunter.

Q. James Hunter? A. That's right.

Q. Do you know where he is now? A. He is dead.

Mr. Pogoda: That is objected to if the Court pleases.

The Court: What is the basis of the objection?

Mr. Pogoda: Unless a proper foundation is laid.

The Court: What is the purpose of the question? Is he named in the conspiracy count in the indictment?

Mr. Starkey: I believe he is, your Honor. I am really not certain of that but whether he is or not he (156) does have a direct relevance in this case and in this trial.

The Court: Is it your suggestion that you are going to attempt to connect Hunter up in here?

Mr. Starkey: Yes, your Honor.

The Court: I will overrule the objection.

James Hunter is named as a co-conspirator.

Mr. Starkey: That was my recollection, your Honor, but I didn't want to make a definite statement without checking it.

Q. Do you know where Sunny Hunter is now? A. He is dead.

Q. Do you know whether or not Hunter ever carried packages off Grace Line vessels?

Mr. Somers: I will object to that.

The Court: I will sustain the objection. Rephrase the question. Ask him if he ever saw him.

Q. Did you ever see James Hunter carry packages off? A. I saw him once carrying some off. He told me about it.

Q. Now, on how many occasions did he carry off, if you know?

Mr. Somers: I object to that.

(157)

Mr. Carluccio: I object, your Honor, because he said "packages." It could be any kind of packages.

The Court: I think you ought to rephrase your question.

Who was Hunter? What was his work?

The Witness: Longshoreman.

The Court: He worked with you?

The Witness: Worked with me in the same gang.

The Court: I see. Now, you say you saw him carry a package off on one occasion.

The Witness About three times, I guess, is the rate I can remember.

The Court: You say you saw him carry packages off three times.

The Witness: That's right.

The Court: Suppose you tell the jury the circumstances of these three occasions? In other words, just tell the jury all you know about them.

The Witness: Well, Sunny taking the packages off, but he didn't know what was in the packages.

Mr. Carluccio: Objection, your Honor. I don't

see how he would know whether the other person knew what was (158) in the package.

The Court: What is the basis of your statement that he didn't know what was in the package?

The Witness: I mean, he didn't know. I didn't know myself.

The Court: You didn't know what was in the package either?

The Witness: I did not.

The Court: And why do you say Sunny didn't know or Hunter didn't know?

The Witness: Well, he didn't say anything about he knew.

The Court: And that is the basis of your statement, the fact that he didn't tell you he knew.

The Witness: That's right.

The Court: All right. Take the witness.

Q. Now, do you recall when it was that, the three occasions that you have just talked about? A. The last part of '56 and the first of '57.

Q. And will you tell the jury whether or not you had any conversation beforehand with him about this? A. With who?

Q. With Sunny Hunter. A. Did I have a conversation with him?

(159)

Q. Yes. A. Yes, I did.

Q. What did you say to him? A. I told him——

Mr. Carluccio: I object before this answer comes out. First, Hunter is dead. Secondly I don't see how Hunter's conversation is an admission against the defendants here.

The Court: I assume that counsel is attempting to show that Hunter not only was named in the indictment count but also was a member of the conspiracy and that his actions and statements in furtherance of the conspiracy are chargeable to all the defendants. I assume that is what is happening. I will overrule the objection.

All right, answer the question.

Did you have a conversation with Hunter about carrying things off the vessel?

A. I told Sunny that Jesse had a package that he wanted taken off and I couldn't take it off and if Sunny would take it off for him.

Q. Whom did you say that to? A. To Jesse.

Q. You had a conversation with Jesse? (160) A. That's right.

Q. On each of these three occasions? A. Not on the three of them. For the first one of them.

Q. And what was said? A. He said he had a package that he wanted me to take off, but Hunter didn't know what was in the package.

Q. What did you say to Jesse and what did Jesse say to you? A. I told him that Sunny would take the package off for him, and I showed him to Sunny.

Q. Did there come a time when you introduced Sunny to Jesse? A. Yes, I introduced him to him.

Q. And what happened then? A. And I—the first time I didn't introduce him to him. I only showed him to Jesse and sent him on the ship.

Q. Then what happened? A. That is when he gave him the package.

Q. Gave who the package? A. Sunny.

Q. Did you see what Sunny did with it? A. Sunny went out to the street with it.

(161)

Q. Did Sunny tell you afterwards what he had done with the package outside? A. He waited on the street and directly at that time he didn't say where he would give it to him.

Q. Did there come a time thereafter when you received the money from Jesse? A. That's right.

Q. Did you have any conversation with Jesse at that time when he gave you the money? A. No, I didn't. In the conversation he only walked by me and—I met him in the hallway on the ship around the balloom and there is where he gave me the money.

Q. Now, will you tell the Court and jury what happened on the second and third times that Hunter carried off packages, from the beginning, from conversations with Jesse, if any.

Mr. Pogoda: May we have a time, if the Court pleases, and the ship from which it was carried off.

Q. Do you know what the ship was? A. No, I don't know what ship it was.

Mr. Starkey: I think the witness has already given a time, your Honor.

The Court: For counsel's benefit will you give (162) us the time again? About when did these three occasions take place?

The Witness: Around the last part of '56 and the first of '57.

The Court: All three of these occasions did?

The Witness: That's right.

The Court: And how far apart were they, one week, two weeks, a month?

The Witness: About six weeks.

The Court: They were six weeks apart?

The Witness: Something like that.

The Court: Can you fix the time any closer than that?

The Witness: I cannot.

The Court: All right, take the witness.

Q. Do you know how long it takes a ship to go on a voyage, a Grace Line vessel, and return? A. Well, the regular one takes around six weeks to make a trip.

Q. All right. Now will you tell the Court and jury what happened on the second and third occasions that you say——

Mr. Pogoda: If the Court pleases, I respectfully object to this line of questioning. The overt acts alleged in count 8 of the indictment only cover one (163) incident with James Hunter and anything beyond that I think is something for which these defendants were unable to prepare for trial, and certainly it is not admissible against these defendants at this time.

The Court: That is overruled. The government is not limited to proof of just the overt acts shown in the indictment.

All right, answer the question, please.

A. About the last time.

James Barber—for Government—Direct

The Court: Repeat your question.

Q. Will you tell the Court and jury what happened on the second and third occasions when you say Jimmy Hunter carried packages off? Did you have conversations with Jesse on those occasions? A. Only one.

Q. And what was said? A. I told him—he said he had the packages he wanted to take off and I told him I couldn't take it off, but I had a boy that would take it off for him and I told him I would show him the boy and I went on the dock and showed him to Sunny, and that is when Sunny went up on the ship.

Q. How many times did you receive money from Jesse after you say Sunny carried off packages? (164) A. Three times.

Q. And did Jesse tell you what happened on those occasions? A. On those occasions, the last three times?

Q. Yes, did he tell you what happened when he gave you the money? A. No, he didn't tell me what had happened.

Q. How do you know that Jimmy Hunter carried off the last two times, or on three occasions? A. You see, he told me about it.

Q. Who did? A. James Hunter.

Q. What did he tell you ? A. After he had taken them off.

Q. What did he tell you? A. He told me he had taken off two packages.

Q. Besides the first one when you were there? A. Besides the first one.

Q. Well, did he say whether or not he received money for it? A. No, he didn't.

Q. How do you know? A. Because he told me he didn't receive no money.

Mr. Carluccio: Your Honor, if the Court please, (165) I object again to this line of questioning with reference to Hunter because, for one, Hunter isn't any defendant in the case, and two, Hunter is dead, and three, it is all based upon hearsay of which we have no opportunity to refute. I make that objection for the record.

The Court: All right, sir. Same ruling.

Take the witness.

Q. Did you say before that you received the money from Jesse on the other two occasions? A. That is what I said. I received the money and he gave it to me and I put it in my pocket but how much I don't know because I had some money in my pocket.

Q. Who told Jesse to give you the money instead of to Hunter? A. I told Jesse that.

Q. Do you know whether or not Hunter received any money after that? A. I don't know about that.

Q. Didn't you pay him money? A. I gave him half of it.

Q. On each occasion? A. That's right.

Q. When did you tell Jesse not to give any money (166) to Jimmy Hunter but to give it to you? A. On the ship.

Q. How many times? A. It was three times.

Q. Three times you told him that? A. Three times.

Q. And that would be before the package was carried off on each occasion? A. No, it wasn't before. I can't remember just recalling that, whether it was before or after.

Q. And when did these three incidents occur?

The Court: We have been through that twice already now.

Mr. Starkey: All right, your Honor, I have no further questions.

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(296)

PAUL KING, called as a witness by the government, having been first duly sworn, testified as follows:

Direct examination by Mr. Starkey:

Q. What is your occupation, sir? A. Merchant seaman.

Q. How long have you been a seaman? A. Ever since I have been 15 years old.

Q. Do you know Jesse Colson? A. Yes, I did.

Q. When did you first meet him? A. I met him in 1946 in Odessa, Russia.

Q. Did there come a time thereafter when you renewed your acquaintance with him in 1958? Yes, sir.

Q. Did there come a time in 1958 when you sailed on the Santa Maria of the Grace Lines? A. Yes, sir.

Q. Do you recall when it was that you sailed on that occasion, Mr. King? A. It was February. I joined the ship on February 26th.

Q. And how long after that did you sail? A. It was March 1st.

Q. Did there come a time, after you signed on, (297) that you had a conversation with Jesse Colson? A. Yes, sir.

Q. Where did that conversation take place? A. At his home.

Q. What did he say to you and what did you say to him at that time?

Mr. Pogoda: If the Court pleases, I assume this is with reference to count 8 of the indictment.

The Court: This is with reference to the conspiracy count, I think.

Mr. Starkey: That's correct, your Honor.

The Court: All right. What did you say to him and what did he say to you at that time?

A. He asked me, since I was going down to South America, would I pick up a package of paint solids for him. And I agreed to do so.

Q. And was anything else said at that time? A. Well, he gave me a letter to give to people in South America. It was written in Spanish, and so the address was that of people in South America.

Q. Where in South America? A. Chile.

Q. What city? A. Valparaiso.

(298)

Mr. Carluccio: Your Honor, what date is this that he is speaking about?

The Court: Did you give him a date?

Mr. Starkey: Your Honor, I believe the witness testified that it was between signing on on February 26th and the time of sailing on March 1st.

Q. Did he give you anything else besides the letter? A. I believe it was part of a playing card. He said that he would send half the playing card down there and I should keep the other half.

Q. What were you to do with the other half? A. I was supposed to present it to the fellow who had the paint solids.

Q. And you sailed on March 1st? A. March 1st.

Q. What did you do when you arrived in Valparaiso? A. Well, I still had this letter in my suit coat pocket and I practically forgot all about it, and so I was out in the streets for the first time I was in Valparaiso so I was looking over the town and I happened to run my hand in my coat pocket and I came up with this letter. So I caught a cab and went to this address.

Q. And what happened when you got these? A. Well, I knocked on the door and a woman answered (299) the door, and she asked me what did I want. So I presented her with the letter. And she asked me would I come in and I came in and she told me to sit down and then a fellow came out, and he looked at the letter and told me to wait. So I did so.

Q. What happened thereafter? A. Well, about three-quarters of an hour or a half hour, within that period of time, he came back out with a package, and he gave me the package and said thank you. So I took the package and left.

Q. What did you do with the package? A. Well, I stuck it in my coat pocket and went on around the city looking at the city, and then when I reached back to the ship I just took it and threw it in my locker.

Q. Now, on the way back to New York did there come a time when you received a letter? A. Yes. Jesse wrote me a letter. I received it in Callao, Peru.

Q. Did you ever discuss that letter thereafter with Jesse? A. No, I don't believe so.

Q. How do you know it was from Jesse? Did you recognize his handwriting? A. Yes, I did.

(300)

Q. Now, do you still have that letter? A. No, sir, I don't.

Q. What did you do with it? A. I imagine I destroyed it, threw it away, like I do most all my letters.

Q. Do you recall what he said in the letter? A. Well, it was mostly small talk. In the letter he said that if anyone should ask what happened to the paint solids besides him to tell them that I misplaced it or I threw it away or lost it, or something like that.

Q. Now, do you recall when you arrived back in New York? A. It was April 7th, I believe.

Q. Do you recall whether in the letter he mentioned anybody else? A. He mentioned, I believe, a fellow by the name of Duke.

Q. What did he say about Duke? A. He said if Duke should ask me what happened to the paint solids, to tell him that I lost it.

Q. Do you know who Duke is? A. He was a friend of Jesse's, or is a friend of Jesse's.

Q. When did Jesse introduce you to him? (301) A. I met Duke some time before I caught the ship.

Q. Do you recall what Jesse said when he introduced you to him? A. No, I don't.

Q. Do you know Duke's real name to be Mitchell Anfield? A. No, I don't.

Q. Do you see Duke in the courtroom? (A pause) A. No, I don't believe so.

Q. Do you want to get off the stand and come down and look? (A pause) A. I believe that is him over there.

Q. What kind of clothes is he wearing? A. He is wearing a brown sport coat, I believe, a checkered sport coat.

Q. Will you go down next to the man and look at him, please? A. I don't even see him. I don't remember him. In the pink shirt.

Q. Will you return to the witness stand, please.

Mr. Starkey: Let the record show that the witness identified the defendant Anfield.

(302) A. It's been a long time since I saw him.

Q. Now when you returned to New York do you recall when you arrived? A. It was April 7th, I believe.

Q. What happened when you arrived in New York? A. When I arrived in New York Jesse and Duke meet me when I was coming off the ship. They were waiting outside the gate. So Jesse greeted me and they started talking. So he asked me what did I do with the package, the paint solids, and I then recalled the letter, and told him that I lost it.

Q. The paint solids? A. The paint solids.

Q. What was said then? A: Well, there was some discussion of how I lost it, or why did I lose it, or something like that.

Q. Who discussed it? Who said what? A. Well, the discussion was between Duke and Jesse.

Q. And what was said to the best of your recollection? A. Gee, it's been a long time. I can't exactly tell you exactly what was said.

Q. Did you have any conversation, you, yourself, (303) with Duke, or he with you? A. Well, the conversation was mixed up between three.

Q. Do you recall anything Duke said to you? A. No, not offhand.

Q. Where did you go from the pier? A. We went uptown and went to a couple of bars and had a few drinks, and then they took me home.

Q. Was there any conversation before they dropped you off? A. Well, there was conversation back and forth about different things, and about the paint solids also.

Q. Was there any more said about them? A. Well, I don't exactly remember what was said but there was some discussion of it.

Q. Well, what did you do thereafter? A. Well, I went home and Jesse asked me did he want me—did he want for me to pick him up, or did he want—let me get this straight. Did he want him to pick me up in the morning.

Q. To do what? A. To take me back down to the ship.

Q. What did you say? A. I agreed, yes.

(304)

Q. Was there any further discussion with him about the package after Duke was gone? A. No.

Q. Then the following morning did there come a time when he did pick you up? A. Yes, he did.

Q. Was he alone? A. No, he was with another fellow called Icky.

Q. Do you see Icky in the courtroom? A. No, I don't remember him. I only saw him once.

Q. But you rememer the name Icky? A. Yes.

Q. What happened after Jesse and Icky picked you up? A. They took me down to the pier, and I was a little late, so I wanted to go right in as soon as I possibly could, so they stopped to get some coffee, and it was at this little restaurant, so I went right in, and I was informed when I went aboard the ship that it was my day off, because it was a policy of Grace Line at the time that one man would get—half the crew would get a day off in each port, I meant home port.

So after I found out that I had the time off, I said, well,

rather than have them come on the ship, pick up the package and talk and fool around on the ship, (305) I would rather get off the ship right there and then and go back home. So I picked up the package and walked out off the ship with it.

Q. And then what did you do with it? A. Well, I walked out the gate with the package, and I handed it to Jesse.

Q. Was there any conversation at that time? A. Yes, there was. He said I was a darn fool for bringing the package out. I asked him why. He said because I could have gotten myself in a lot of trouble. I said, "What kind of trouble. It's paint solids." He said, "You still shouldn't have took the package off. I didn't want you to bring it off." I told him, "Well, why is it you didn't want me to take the package off?" He says "Because it is narcotics," and I got pretty warm at him because I seen my seaman's going, my job and everything else.

Q. You got what at him? A. I got pretty peeved, I got angry at him.

Q. Did you tell him so? A. Absolutely.

Mr. Starkey: No further questions.

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(1385) • • •

FINBARR J. MURPHY, called as a witness on behalf of the government, being duly sworn, testified as follows:

Direct examination by Mr. Starkey:

Q. What is your occupation, Sir? A. I am a customs agent with the Treasury Department, Bureau of Customs.

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(1411) • • •

The Court: Did you see the defendant Anfield enter Colson's car?

The Witness: I did.

(1418) • • •

By Mr. Starkey:

Q. Will you state what was said by Anfield on this occasion. A. He stated that he had made one run down to (1419) Valparaiso, Chile. It was on the Santa Louisa. And at the time he brought it into the country here, he had it hidden in his mattress. He stated that he was not worried about being arrested, because since the Massiah arrest, approximately two years had transpired, and, "if I were to be arrested I would have been arrested long ago."

He stated that he had received a fair deal from Jesse Colson, that after every sale was made the money was split down the middle on the table, and if there was any cocaine left it would be split, too.

Q. Was anything said about when this run took place? A. This, yes. This run that the defendant Anfield made was after the stickup of the defendant Massiah. He stated that, "After the stickup I made the run. Then you made two or three more, Jesse, and then we got defendant Massiah back in, and it was at this time that all the trouble started, when you brought that boy Paul King into this deal." And his story about coming back with eight ounces being thrown overboard.

• • • •

(1421) • • •

Q. Did there come a time thereafter when you had a conversation directly with Anfield? A. Yes. On the date of the arrest in this building, just prior to his arraignment, I was speaking with another agent in the corridor, and the defendant Anfield called me over and said——

(1422)

The Court: Just a minute, please.

• • • • •

A. This was just a conversation I had with the defendant Anfield. No other defendants were mentioned.

As I stated before, he told me he wanted a drink of water, and, as I approached him, he started to walk outside, and he said, "Wait a minute, Murphy."

I said, "What is it?"

He says, "Well, I would like to come clean."

So I said, "Well, tell me."

He said, "Well, I did bring in cocaine on the Santa Luisa."

I asked him where he kept it. He said he kept it in his locker. I asked him, "Well, how much was it?"

(1423)

He said, "Approximately eight ounces."

I stated, "Well, are you willing to make a statement to that effect after the arraignment?"

He said, "Yes. I want to cooperate fully."

And that was about the sum and the substance of the conversation.

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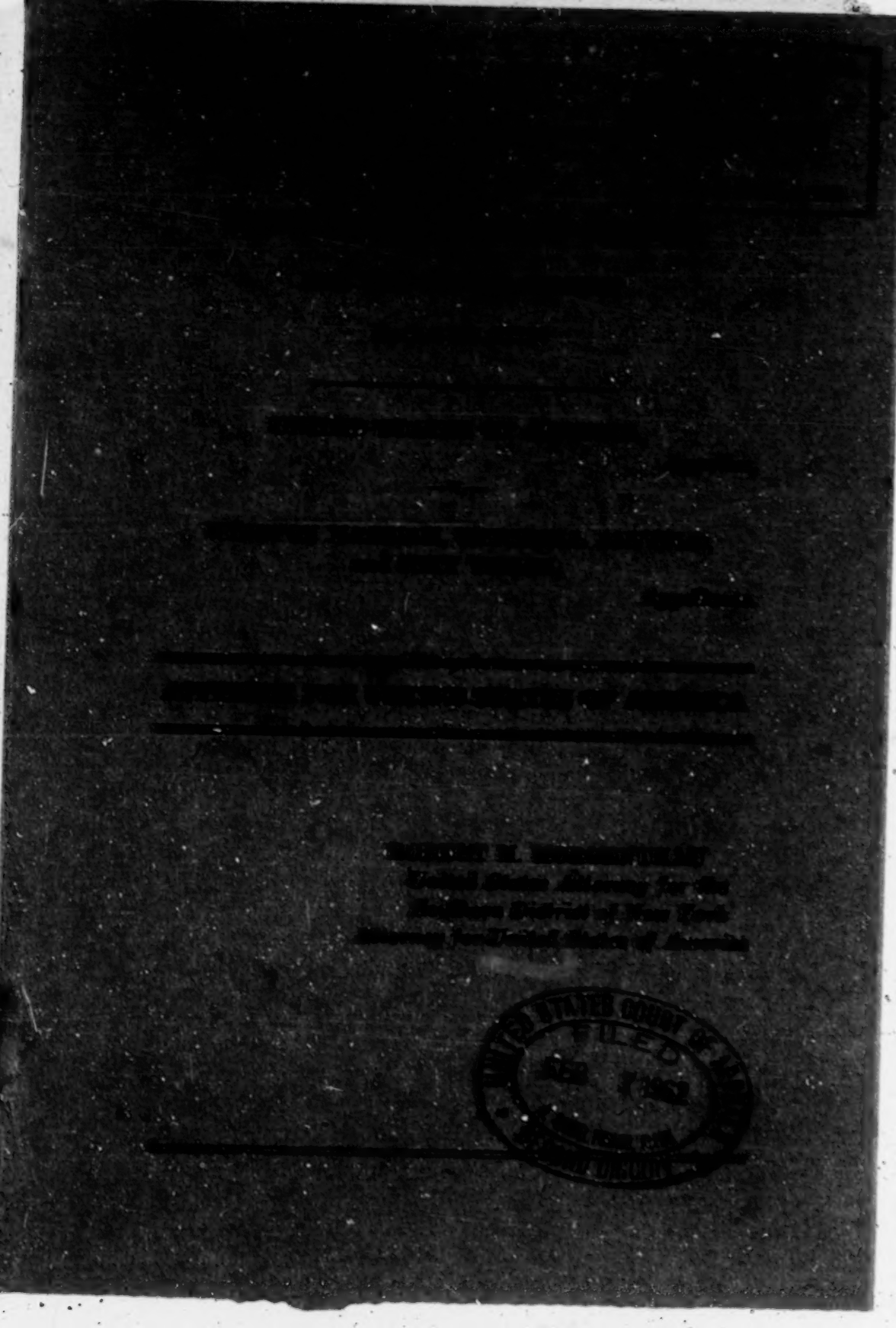

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Excerpts from Testimony

(1)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Cr. 206

UNITED STATES OF AMERICA

vs.

WINSTON MASSIAH, JESSE COLSON, MITCHELL ANFIELD, GRANVILLE SMITH, NOEL MAXWELL, WILLIAM ADAMS, JOHN HENRY PURRY, CLARENCE WHITE, NICK HOLIDAY, ICKY THORN, SYLVIA FERRIS, JOHN DOE, also known as "LEON", meaning thereby to describe a Negro male of medium complexion, with black hair and a medium build, approximately 40 years old, approximately 5' 9" tall, and weighing approximately 165 lbs.,

Defendants.

Before: HON. J. SKELLY WRIGHT, D. J.,
and a Jury.

New York, June 15, 1961,
10:30 o'clock a.m.

APPEARANCES:

ROBERT M. MORGENTHAU, Esq.,
United States Attorney,
for the Government;

By James G. Starkey, Esq.,
Assistant United States Attorney.

Appearances

ROBERT J. CARLUCCIO, Esq.,
Attorney for Defendant Massiah.

(2)

EUGENE K. JONES, Esq.,
Attorney for Defendant Colson.

I. EDWARD POGODA, Esq.,
Attorney for Defendant Anfield.

JESSE ZASLAV, Esq.,
Attorney for Defendants Maxwell, Adams and Purry.

ABRAHAM SOLOMON, Esq.,
Attorney for Defendant White.

NORMAN ARCHER, Esq.,
Attorney for Defendant Thorn.

EARL MCHUGH, Esq.,
Attorney for Defendant Ferris.

MORRIS SOMERS, Esq.,
Attorney for Defendant Aiken.

* * * *

(38)

ELITA LLOYD, called as a witness in behalf of the government, being first duly sworn, testified as follows:

Direct examination by Mr. Starkey:

Q. Will you kindly speak as loudly as you can, Miss Lloyd, so that the jury and the Court can hear you. A. Yes.

Q. Do you know a man by the name of Winston Massiah, Miss Lloyd? A. I do.

Q. Do you see him in the courtroom? A. Yes.

Q. Will you point him out, please. A. (Witness points.)

The Court: Well, suppose you tell us. Now there is a table, a second table, and the chairs against the little rail there. Now tell us where he is.

The Witness: Right there.

The Court: Will the record show that she identified the defendant.

Q. When did you first meet Winston Massiah, Miss Lloyd? A. 1950, in May.

Q. Where did you meet him? A. At my sister's house, at 30 East 128th Street.

(39)

Q. And who introduced you to him? A. A friend of my sister's.

Q. Were you living there at the time? A. Yes, I was.

Q. How long did you continue to live there? A. I lived there until July 1st of the same year.

Q. Where did you move to then? A. To 19 East 128th Street.

Q. Do you know where Massiah lived at that time? A. Well, he was still living with my sister at 30 East 128th Street.

Q. And he was living there as a roomer? A. Yes, he was.

Q. Did there come a time when he moved from there, if you know? A. Yes, there did.

Q. When was that? A. About September of 1950.

Q. Do you know where he moved to? A. He came over to live with me at 19 East 128th Street.

Q. Was there a financial arrangement at that time? A. Yes, there was.

Q. What did you give him and what did he pay? (40) A. Well, he paid $6 for the room.

Q. One room? A. Yes.

Q. How often did he use it thereafter? A. About, I think, every thirty-some days he would be in for about three or four days, five days at the most.

Q. Did he ever tell you where he was during that 30-day period, or 30-odd-day period? A. At sea.

Mr. Carluccio: Objection. It would be hearsay, where he was.

The Court: That is overruled. The question was what the defendant had told her. Overruled.

Where did he say he was?

The Witness: He was at sea. He was working on a ship.

Q. Now, when was it that he moved in? A. About September.

Q. How long did he continue to live there? A. He lived there until '56, around October some time.

Mr. Pogoda: If the Court please, I can't hear this witness.

(41)

The Court: All right, sir.

Would you keep your voice up loud so that counsel and the defendants can also hear you as well as the jury?

The Witness: Yes.

Q. Did there come a time, Miss Lloyd, when you met some friends of Massiah? A. Yes, there did.

Q. At the apartment? A. Yes.

Q. When did you begin meeting these friends? A. Around '56 in May or June.

The Court: Keep your voice up.

The Witness: About '56, May or June.

Q. Do you remember the names of any of them? A. Yes, I do.

Q. Whom did you meet in May or June? A. I met Maxie, Hawk, Jesse, I think——

Q. Do you now know what the full name of the man introduced to you as Maxie is? A. No, I don't know his full name.

Q. Do you recall the name Noel Maxwell?

Mr. Pogoda: I object. He is not one of the defendants on trial. He is not on trial now, and I submit (42) that it has no business in this case.

The Court: Well, I think counsel is trying to set up proof for his conspiracy which involve not only the ones on trial, but also the others who were named, so I will overrule the objection.

Mr. Carluccio: May I object on the ground that it is leading.

The Court: I will sustain that objection.

Don't lead the witness.

Q. Do you know what Hawk's name is? A. No, I don't know his name, Just Hawk.

Q. Do you know what Jesse's full name is? A. Yes, I do.

Q. What is his last name? A. Colson.

Q. And when did you meet Colson? A. I met Colson about June or July, I think it was.

Q. At your apartment? A. Yes, I did.

Q. Who introduced you to him? A. Winston did.

Q. Did you ever hear any conversations between Winston and Jesse Colson during this period? A. No, I did not.

(43)

Q. Now, did there come a time, Miss Lloyd, when you saw some men whom you did not recognize in the apartment? A. Yes, there did.

Q. When did that occur? A. That was about October of 1956.

Q. Would you tell the Court and jury exactly what happened on that day. A. One morning I was making breakfast and the doorbell rang. When I opened the door these two strange men were there to see Winston, so I called to him and he said to let them come in.

Q. Into his room? A. Yes. They came in. One of them went into his room and one sat in the living room. He asked for a cup of coffee and I gave him the coffee, and asked him did he want some toast, and he said yes, he would take some toast, so I went back to make some toast, and the bell rang again and another man came in.

I asked him did he want coffee and he said no. So I asked him would he have a drink, and he said yes, and I gave him a drink. I went back into the kitchen, and after a while they left.

So I went in, when I was through doing my work in the kitchen, I went inside, and Winston was very (44) upset.

So I asked him what happened.

Mr. Carluccio: Objection. I think it is not responsive. All he asked is what happened that day.

The Court: I think we are still on the same day, so I will overrule the objection.

Finish your story, please.

A. (Continuing) I asked him what had happened, and he said that they were not cops.

So I said, "Why cops?"

He got very upset and he was sick and he couldn't answer any more for a long time.

Q. Did he say they were or they were not cops? A. They were not.

Q. What else did he say then? A. He got sick, and we had to call the doctor for him. He was very upset.

Q. Did you have any further conversation with him? A. Later that evening I asked him what really happened, and he said that he had some money——

Mr. Pogoda: If the Court please, I object to any conversation not in the presence of the defendant (45) Anfield insofar as it relates to the defendant Anfield.

The Court: The Court will overrule the objection. I assume counsel is attempting to prove the conspiracy, and the acts and statements of any one of the conspirators in furtherance of this conspiracy are admissible as against all. However, it is a question for the jury as to whether or not these acts and these statements are in furtherance of any

conspiracy. Whether or not, first, of course, there will be a conspiracy proved which the jury will have to determine, and then whether or not these acts which are being testified to, if you believe that they happened as the witness says they happened, whether or not they were in furtherance of the conspiracy. But we will get into that as we go along, so let's proceed.

Mr. Starkey: Thank you, your Honor.

By Mr. Starkey:

Q. What were the further conversations that you had with Winston Massiah that day? A. He said he had some money to go away and they had followed him and taken the money away from him.

Q. Did he say where he got the money? A. At the bank.

Q. Was there any further conversation? (46) A. Not that day. I called him to call the police and tell them about it, and he said they had threatened him and he couldn't do it.

Q. Now, did there come a time thereafter when you again discussed the events of that day with Massiah? A. The following evening Jesse Colson came by and he brought some friends there——

Mr. Somers: I can't hear that, your Honor.

The Court: He said that the following evening Jesse Colson came by and brought some friends with him.

Q. Did you have any discussion with Massiah about a gun? A. Yes, your Honor.

Mr. Somers: I object to that.

Mr. Carluccio: That is leading. There is no testimony whatsoever about a gun.

The Court: That is overruled.

Did you or didn't you?

The Witness: Yes, I did. I asked him if there was supposed to be a gun. I asked him whether it was a real gun or a toy pistol, and he said he didn't know.

Q. A gun in the possession of the men who had been there?

Mr. Carluccio: Objection, your Honor. It (47) is leading.

The Court: Sustained. Don't lead.

Q. Was there anything else said about the gun? A. No.

Q. Now, you say Colson came thereafter? A. Yes, he came the following night and he brought some friends with him.

Q. Did you hear any conversation—how many people were there then? A. Two people.

Q. Two people with Colson? A. Yes.

Q. Did you hear any of the conversation then between them and Winston? A. I overheard something about some money and some stuff.

The Court: Speak up, please. Some money and some stuff? Is that what you said?

The Witness: Yes, your Honor.

The Court: Speak in a loud voice so that everybody can hear you.

Q. Did you hear any more conversation before they left? A. No, I didn't.

(48)

Q. Did there come a time after they did leave when you had another conversation with Massiah? A. I asked him what the stuff was about and he said him and Jesse was in something illegal.

Q. What did you say? A. I got angry then and fussed, I fussed at him and told him that he would have to move away from there.

Q. Was there any further conversation? A. Another night I think they came back——

The Court: Speak louder, please.

A. (Continuing) They came back the following night again and asked——

Q. What happened on that occasion? A. Winston wasn't there. He was visiting upstairs. And I went up to get him, and when we were part way down the steps Jesse came up and he was fussing and laughing at him for being afraid.

Q. Laughing at Massiah? A. Yes.

Q. Did you hear any more conversation on that occasion? A. No, I didn't.

Q. Do you know Mitchell Anfield? A. No, I don't know him.

(49)

Q. Duke? A. Yes, I know him.

Q. Did you ever have any conversation with Winston around this time concerning what he and Jesse had been doing? A. Yes. I asked him what it was.

Q. What did he say? A. Coke.

Q. When did this conversation occur? A. One of the nights before he moved away.

Q. What else was said at that time, or what was said beforehand? A. (No. response.)

Q. In connection with his answer? A. I don't understand the question.

Q. Before he said coke what did you say and what did he say? A. I asked him what it was they were dealing in, and when he said that, I told him then that it was very dangerous and we were all in a situation where we could either have gotten killed or gone to jail.

Q. Was there any further conversation about this? A. He said he was sorry and that he would move away.

(50)

Q. Now, when did you first meet the man you know as Duke? A. A few days after that happened, Jesse brought him by and introduced him to me and said he was his brother.

Q. Do you see Duke in the courtroom? A. Yes, I do.

Q. Will you point him out, please. A. Right there (pointing).

Q. What color clothes is he wearing? A. A pink shirt.

Q. A pink shirt? A. Yes.

Mr. Starkey: May the record show that the witness has identified the defendant Mitchell Anfield?

The Court: Yes.

Q. Was there any further conversation at that time when Jesse Colson introduced Duke to you? A. No. He

just said hello and asked how is everybody doing, and something like that, and then they left.

Q. Do you know a man by the name of James Barber —Jimmie Barber? A. Yes, I do.

(51)

Q. When did you meet him? A. A few days after that happened I met him once. He came to the house one time.

Q. A few days after the business with the strangers in the apartment? A. Yes.

Q. Did you hear any conversation between him and Massiah at that time? A. No, I didn't.

Q. Who introduced you to Barber? A. Well, we were not introduced.

Q. You just saw him? A. Yes.

Q. In whose presence? A. (No response.)

Q. Who was there? A. Winston was there.

Q. Did there come a time thereafter when he did move out, when Massiah did move? A. Yes, there did.

Q. Do you know where he moved to? A. He moved over to 8 East 128th Street.

Q. Did there come a time when he talked to you again about moving back in? A. Yes.

(52)

Q. When was that? A. About five or six months later.

Q. So that would be in the spring of '57? A. About that.

Q. What was the conversation you had with him at that time? A. I don't remember the exact conversation but he wasn't well. He wasn't feeling well, and I think he wasn't working, or something. I am not sure.

Q. Well, what did he say to you, as best you can recall? A. He said he wasn't working, and he wasn't feeling well, and he didn't want to be there alone because most of the time he was sick. He was supposed to have had a bad heart. And most of the time he would be sick, and he wouldn't have any money, and things like that.

Q. What else was said? A. And so I told him, all right, he could come on back.

Q. He asked you if he could come back? A. No.

Q. On that occasion? A. No, not exactly. We were just discussing his (53) illness and rough times, and all that, and I told him he could come on back over there because it was very hard for him alone where he was.

Q. Did you have any discussion about the past at this time? A. Yes. He said he never would do anything like that again.

Q. And then he did move back in? A. Yes, he did.

Q. Now, did you see any of his friends around the apartment thereafter? A. For a long time I didn't see anyone.

Q. How much time passed, would you say? A. Oh, it must have been a year, I think.

Q. And whom did you see then? A. Then I saw Maxie and Hawk, they came back about twice and visited him for a while.

Q. And that would be in the spring of '58 or the early part of 1959, about a year later?

Mr. Carluccio: Objection, your Honor. She should testify to the time.

The Court: I think she has already testified that it was about a year later.

In other words, you testified, as I understand it—

(54)

The Witness: I don't know exactly, but it was a very long time. It seemed about a year.

Q. Now, after Massiah returned and you saw Maxie and Hawk again, did there come a time when you saw Jesse? A. Yes.

Q. When did you see him again? A. Well, Jesse—he didn't stop coming. He used to come off and on and visit.

Q. When did you see him again after the incident with the men in the apartment, the strange men? A. I think the day after.

Q. Well, after Winston moved out did you see any more of Jesse before he moved back in? A. No.

Q. And he moved back in how long after he moved out? A. About five or six months.

Q. Five or six months after October of '56; is that right? A. Yes.

Q. Now, after he moved back in then in the early part of 1958, when did you next see Jesse? A. Well, soon after he moved back in, Jesse came. Jesse would visit him often.

(55)

Q. How often did he visit him thereafter? A. I can't say exactly how often, but he used to come by every so often.

Q. About how many times would you say you saw him before May of 1958? A. I can't say in numbers how many times.

Q. Now, did there come a time after you began seeing Maxie, Hawk and Jesse coming around to see Winston again when you received a letter from Winston? A. Yes, I did.

Q. When was that? A. That was just before he was arrested.

Q. On this charge? A. Yes.

Q. And do you remember when he was arrested for this charge on which he is now on trial? A. It was 1958, either May or June.

Q. And how long before this occurred did the letter come? A. He was at sea when the letter came.

Q. And how long had it been since you had seen him before the letter came? A. A few weeks, I think.

Q. He had been out in a few weeks and he had not yet gotten back, and you received a letter? (56) A. That's right.

Q. Do you still have the letter? A. No, I don't.

Q. Do you know what happened to it? A. I gave the letter to Jesse.

Q. Will you tell the Court and jury what the letter said.

Mr. Pogoda: Objection, if the Court please.

The Court: On what basis do you think the letter is admissible so that she can testify to this?

Mr. Starkey: May I approach the bench, your Honor?

The Court: Well, let me ask you this: How did you know the letter was from Massiah?

The Witness: Because it had his return address on it.

Elita Lloyd—for Government—By the Court

The Court: Is that the only reason why you knew it was from Massiah? Did you know his handwriting, for example?

The Witness: Yes, I did.

The Court: Did you recognize his handwriting in this letter?

The Witness: Yes, I did.

The Court: Did he sign the letter?

(57)

The Witness: I think he did; yes.

The Court: And you recognized the handwriting throughout the letter as being Massiah's?

The Witness: I believe I did.

The Court: Did you customarily receive letters from him?

The Witness: Once in a while. Not very often.

The Court: There isn't any doubt in your mind that this letter was written by Massiah?

The Witness: No, I don't think so.

The Court: Well, the Court is going to overrule the objection. The witness has shown that she doesn't have possession of the letter anymore and consequently she is in a position to testify to what was in it since she does say that she knows that it was written by Massiah, so I will overrule the objection.

Mr. Somers: Your Honor, may I note for the record that I except to that ruling on the ground that the letter, of course, is the best evidence. This is secondary evidence, and the reason given is certainly not sufficient to overcome the rule of best evidence, the best-evidence rule.

The Court: All right, sir.

Proceed. Answer the question. Tell us what (58) was in the letter.

The Witness: Well, he wrote the usual letter saying "Hello," and "How are you?" and all, and then he sent a message in to Jesse. He said that I should call him and tell him he will bring in some discos, which is a Spanish word for phonograph records. so I called Jesse and gave him the letter.

By Mr. Starkey:

Q. Did you have any conversation with Jesse at that time? A. No; I just told him that Winston had sent this message to him, and then he asked me to call Duke, and I called Duke, and they came and then they went away.

Q. You called Duke? A. Yes.

Q. At Jesse's request? A. Yes.

Q. And what did you say to Duke? A. That Jesse asked him to meet him at my house.

Q. And did Duke come over thereafter? A. Yes.

Q. What happened when he arrived? A. Nothing. He just said hello to me and him (59) and Jesse left. Jesse waited there until he came, and then they left.

Q. Did you see Duke and Jesse thereafter? A. I saw Jesse after that.

Q. When did you see Jesse next? A. I don't remember exactly.

Mr. Starkey: I have no further questions of this witness, your Honor.

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Elita Lloyd—for Government—Cross

(86) • • •

Cross-examination by Mr. Somers:

• • • •

(92) • • •

Q. And was there a period of time when you lived as man and wife with Massiah, this defendant, against whom you are testifying today? A. We didn't live as man and wife.

Q. You didn't live as man and wife? A. No. We did not live as man and wife.

Q. You never occupied the same room? A. That's right.

Q. Do you recall, Miss Lloyd, that you made—you told Mr. Starkey all about your relationship with Massiah in connection with this case and that he took notes? You do recall that? A. Yes, I do.

Q. Now, Mr. Starkey has presented to the Court his (93) notes——

Mr. Starkey: Your Honor, I will object. I think this is speech making rather than asking questions.

Mr. Somers: I am going to present this to her and ask her to read it, and that is all, your Honor.

Mr. Starkey: All right, I ask that counsel do that then.

Q. I am going to offer to you Court's Exhibit 1, and I ask you to read this to yourself, right there, beginning with that paragraph (handing). A. (Witness does as requested.)

Q. Now, in light of that paragraph, would you care at this time to change your statement with respect to whether or not you were living with Massiah as man and wife? A. We did not live as man and wife; we became friends. We became intimate friends for a while but we were not living as man and wife.

Q. You never had sexual relations with him? A. Yes, I did.

Q. I take it, then, that you were on very close terms with him? You were very— A. Yes.

(94)

Q. He was devoted to you, would you say?

Mr. Starkey: Objection.

The Court: I will overrule the objection.

Can you answer the question?

A. Yes, he was——

Q. And you were devoted to him? A. I would say I was.

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(441) * * *

SYLVIA FERRIS, called as witness by the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Starkey:

Q. Miss Ferris, have you been convicted of any crimes? A. Yes, I have.

Q. Were you convicted of a narcotic violation here in the Southern District of New York in 1951? A. Yes.

Q. You were convicted of two violations of the Public Health law for possession of a needle in New York City; is that correct? A. Yes.

Q. And once for prostitution? A. Yes.

Q. And once for possession of narcotics in New York City? (442) A. Yes.

Q. Have you ever used narcotics, Miss Ferris? A. Yes, I have.

Q. Have you used heroin? A. Yes.

Q. Cocaine? A. Yes.

Q. When did you begin to use heroin? A. In 1951.

Q. When did you begin to use cocaine? A. Around 1954.

Q. On how many occasions would you say you have used cocaine. A. Well, 100 or more times.

Q. How did you administer cocaine to yourself? How did you use it? A. Well, I sniffed it and by the needle.

Q. By use of a needle? A. Yes.

Q. Of the numbers of times you have used cocaine, what proportion or what number would you say you have sniffed and used a needle? A. Well, I cannot say actually. It could be maybe a hundred times, over a hundred times.

(443)

Q. Well, by means of a needle or sniffing? A. Well, half and half.

Q. About half and half? A. Yes.

Q. Are you familiar with the appearance of cocaine? A. Yes.

Q. What does it look like? A. It looks like salt somewhat.

Q. Now, do you know a man by the name of Icky Thorn? A. Yes.

Q. Did there come a time when you began to live with him? A. Yes.

Q. When was that? A. In 1956. August of 1956.

Q. Now, did there come a time thereafter when you met a man by the name of Jesse Colson? A. Yes.

Q. Who introduced you to him? A. I met him first in the Lenox Rendezvous.

Q. That's a bar? A. Yes. And then after he came to my house, (444) and when he came to the house, Icky introduced me to him.

The Court: Just a minute, please. Who introduced you to him?

The Witness: Icky introduced me to him. We both knew him.

Q. What was said when Icky introduced you to him at the house? A. Well, when he introduced me to him at the house, Jesse knew that I was interested in cocaine, and he told him, Icky told him that I would be interested in buying some cocaine, that he could see me if I wanted to buy any.

Q. He told you you could see Jesse? A. Yes.

Q. What did Icky say about you, in what capacity did he introduce you to Jesse? A. Well, he told Jesse that I was his girl.

Q. Was there any other conversation at that time?

Mr. Somers: Place it, please, Mr. Starkey.

Q. When was it that you met Jesse at the apartment when Icky introduced you to him? A. In 1957.

Q. What part of the year? (445) A. Around the fall of 1957.

Q. And was there any other conversation at that time? A. Well, at that time Jesse asked Icky if he knew how to cut cocaine, and Icky told him he didn't know anything about cutting cocaine.

Mr. Somers: I am sorry. I can't hear this witness.

The Court: Can you keep your voice up, please, so that counsel can hear you back there?

Read the answer back.

(Answer read.)

Q. Was there anything else said? A. Jesse told me the price that he was charging for the cocaine.

Q. Did you see any at that time? A. At that time he brought a sample by for me.

Q. Was there any conversation about learning how to cut cocaine? A. No, there wasn't.

Q. Did there come a time a week later when you talked with Icky about Jesse? A. Well, a week later Jesse had been calling us, and Icky said that Jesse was going to bring us some (446) cocaine by for our own use.

Q. Well, what did Icky say to you at that time? A. Well, at that time Jesse did bring some cocaine by and left it for us.

Q. Was this a week later? A. About a week later, maybe two weeks later.

Q. Did there come a time—were you present at that time? A. I don't know for sure whether I was present or not.

Q. Well, did this happen on more than one occasion? A. About twice it happened.

Q. When were the two times it occurred? A. About maybe two or three weeks apart.

Q. And how soon after Jesse had been up there the first time?. A. How soon after he had been up the first time?

Q. Yes, when you were introduced. A. Maybe a month after.

Q. And was that the first or the second time that was a month after? A. The first time.

Q. Well, when was the second time? A. The first time was about three to—three weeks (447) to a month after the first time.

Q. When was the second time? A. Three weeks to a month, the second time from the first time.

Q. Three weeks to a month after the first time came the second time? A. Yes.

Q. And how long after Jesse had been up the first time when he brought the sample did the first time occur? A. I don't know what you mean.

Q. You said that this happened twice? A. To my recollection, twice, yes.

Q. All right. Twice after Jesse had been introduced to you at the house, is that right? A. Yes.

Q. How long after the introduction was the first time? A. About a week.

Q. About a week? A. Yes.

Q. Were you present when it happened on that occasion? A. I can't recall.

Q. Were you present when it happened on the second (448) occasion? A. It might have been the first or the second occasion.

Q. Now, on the time that you were not present did you have a conversation with Icky about it? A. Well, when I came home the cocaine was there, and we used it, and I knew that Jesse had left it.

Q. Did you have any conversation with Icky? A. Yes. He told me that Jesse was there and left some cocaine for me.

Q. How much was there? A. Well, what he left, maybe it was about a quarter or maybe less.

Q. A quarter of an ounce? A. Yes.

Q. Now, on the second occasion you were present or on one of the two occasions you were present? A. On one of the two occasions.

Q. What happened on that occasion? A. On the second occasion I came home and it was there, and also he had been there and left it. Jesse had been there and left it the second time.

Mr. Somers: I will object to that and move to strike it out.

(449)

Q. How did you know or what led you—did you have any conversation with Icky about it? A. Well, actually I knew that Jesse was bringing——

Q. No. Did you have any conversation with Icky about it? A. Yes.

Q. What was said? A. He said that Jesse had brought some cocaine for me again.

Q. Did you see any cocaine? A. Yes, I saw it.

Q. How much was there? A. Well, about a quarter—about the amount I don't know too much about, but I imagine it was about a quarter of an ounce.

Q. Did you ever receive any cocaine from Jesse yourself? A. Yes.

Q. On how many occasions? A. About five or six occasions.

Q. During what period? When did this happen? A. About seven or eight months after I met him.

Q. And where did you receive this cocaine from him? (450) A. Well, various places in the street. I would meet him and he would give it to me.

Q. In what quantities? A. From a quarter of an ounce to half an ounce.

Q. And did you pay Jesse for it? A. Yes.

Q. Always? A. On most occasions I paid him, yes.

Q. How many times did you not? A. About twice, maybe once or twice.

Q. And before these occasions when you picked up cocaine and didn't pay Jesse money did you talk with anyone about it? A. Well, he called the house. Jesse called the house when I wasn't home and Icky told me that Jesse had some cocaine for me, and I went and met him and picked it up.

Q. Did he tell you to go over and get the cocaine? A. Yes, he told me that Jesse had called.

Q. Did there come a time when you met a man by the name of Duke or Mitchell Anfield? A. Yes.

Q. And who introduced you to him? A. Jesse introduced me to him.

(451)

Q. Where did this take place? A. In the Lenox Rendezvous.

Q. And when? A. About two months after I had met Jesse.

Q. And what did he say when he introduced you? A. He told me that Duke was his partner and any time I wanted to buy cocaine I could see Duke.

Q. Did there come a time thereafter when you did see Duke? A. Yes.

Q. What happened on that occasion? A. I bought a quarter of an ounce from him.

Q. How much did you pay for it? A. $150.

Mr. Pogoda: May I have the time and place where this alleged sale took place?

Mr. Starkey: Well, the witness testified two months after she met——

I am sorry, your Honor. Withdrawn.

Q. You met Duke about two months after you met Jesse, is that what you said? A. Yes.

Q. Can you fix the time, or how closely can you fix the time when this purchase of cocaine took place? (452) A. Well, I don't remember the exact time.

Q. The best you can do? A. (No response.)

Q. How long after you met him? A. Maybe about two or three months after I met him.

Q. About two or three months? A. Yes. It was about two or three months.

Q. Did you know where Duke was living at the time? A. At that time I knew he was living on Seventh Avenue, yes.

Q. Near what street? A. Between 113th and 115th Street, along there.

Q. Did you ever go there? A. Yes, I did.

Q. Who was there on the occasion you went up there? A. Jesse and Duke.

Q. And how long after you met Duke did this happen? A. Oh, about, maybe a month or two after.

Q. And what happened when you were up there? A. We sniffed some cocaine.

(453)

Q. Now, did there come a time after you met Jesse and Duke when you discussed Duke with Jesse? A. When I discussed Duke with Jesse?

Q. When you talked with Jesse about Duke? A. At one time Jesse came to me and told me about him and Duke.

Q. Well, now, when would you say this occurred? A. Near the end or maybe in '58. The times I can't remember exactly.

Q. About how long after you met either Jesse or Duke? A. Maybe about eight months after.

Q. After you met whom? A. After I met both of them.

Q. You met them close together? A. Yes.

Q. Where did that conversation take place where Jesse was telling you about Duke? A. In the bar. In the Lenox Rendezvous.

Q. What did he say? A. He said that him and Duke wasn't getting along.

Q. What did you say? A. I told him he should be able to handle his (454) business himself.

Q. Did Jesse ever give you anything besides cocaine? A. Yes. He brought me a tray, a ceramic tray.

Q. Did he tell you where the tray was from? A. Yes.

Q. Where? A. From South America.

Q. When did this occur? A. Well, about eight months after I had known him.

Q. Eight months after the fall of '57? A. Yes, it was in '58.

Q. Do you see Duke in the courtroom? A. Yes.

Q. Will you point him out, please? A. He is sitting there in the white shirt.

Mr. Starkey: May the record show that the witness has identified the defendant Anfield.

Q. Do you see Icky in the courtroom? A. Yes.

Q. Where is he? A. Sitting next to him, next to Duke.

Mr. Starkey: May the record show that the (455) witness has identified the defendant Thorn. I have no further questions of this witness, your Honor.

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(539) * * *

BARNEY L. FINK, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Starkey:

Q. What is your occupation, Mr. Fink? A. I am a commercial manager, local commercial manager for the New York Telephone Company.

Q. Local for what district and what area? A. I handle several different exchanges and included is the Lorraine 2 exchange.

Q. And what are your duties? A. Handling—well, complaints, orders, collections, and maintenance of records.

(540)

Q. You are the highest Telephone Company employee that is in charge of this particular subdivision, is that correct? A. That's right.

Q. Now, Mr. Fink, did you bring certain documents with you to the courtroom?

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(549) • • •

By Mr. Starkey:

Q. I ask you to read from the documents to the jury the date of the telephone call, the point of origin, the point of destination, and the person who was called. A. The call was originated on February 20, 1958. The call was made from a coin telephone, RIV 9-9767, by a party representing himself to be Jesse Colson and he asked that the charges be made to LOrraine 2-8373. The call was sent to Valparaiso, Chile. The number called was 6085, and the particular person requested was—I believe it is Rene Huasaff. It looks like an "F".

Q. Will you read also from those records to the jury and the court, Mr. Fink, if the entry appears there, who the subscriber of that LOrraine number was (550) at that time? A. Yes. Mr. Jesse Colson was the subscriber at that time.

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(650) * * *

WILLIAM JOHN MCNAMARA, called as a witness on behalf of the government, being first duly sworn, testified as follows:

Direct examination by Mr. Starkey:

Q. What is your occupation, Mr. McNamara? A. United States Customs Enforcement Officer.

Q. How long have you been so employed? A. 17 years.

Q. Were you on duty on May 6, 1958? A. Yes.

Q. What was your assignment on that date? A. On that day I was assigned to the after section part of the S/S Santa Maria with a partner, Edward Adams.

Q. And what was your assignment at that time? What were you supposed to be doing? A. To be searching the ship.

Q. Did you do so? (651) A. Yes, sir.

Q. What part of the ship did you search? A. The aft peak.

Q. Did you find anything in the aft peak that was not part of the ship's equipment? A. Yes. After moving some rope and some cargo nets I come across five packages.

Q. What was their appearance? A. About three and a half inches by about eight inches, white packages, and they were partially covered by a blue cloth.

Mr. Starkey: I ask that these two items be marked for identification as Government's Exhibits 12 and 13.

(Government's Exhibits 12 and 13 marked for identification.)

Q. Now I show you Government's Exhibits 12 and 13 for identification, sir, and ask you if you recognize either or both. A. Yes, sir, I recognize this one, sir.

Q. Where and when have you seen that before? A. On the Santa Maria. It was partially covering these five packages.

Q. Now, I show you the contents of this bag (652) marked Government's Exhibit 8 for identification, and ask you if you recognize them. A. Yes.

Q. Where and when have you seen them before? A. On the Santa Maria.

Q. What were the circumstances? A. Well, they were on—after I had moved this rope these were laying forward inside of the plastic bag and one was laying outside of it.

Q. Were they in the same condition that they are now? A. No.

Q. How were they different? A. Well, they had powder in them.

Q. Now, then, after you discovered Government's Exhibit 12 for identification and 8 for identification, what did you do? A. Well, I informed my partner, Mr. Adams, to notify my——

Mr. Pogoda: I object to any conversation.

Q. Well, you had a conversation with Adams?

The Court: Just a minute, please.

You can say what you said, but you can't say what somebody told you. Do you understand that?

(653)

Mr. Pogoda: I will object to any conversation

he may have had with a partner not in the presence of the defendants.

The Court: The ruling is still the same. Proceed.

Q. What did you tell Adams to do? A. To notify my superior officer.

Q. Who was he? A. Mr. Wardner Bartlett.

Q. And after you did so, did there come a time when Bartlett came to the place where you were? A. Yes.

Q. Did you have a conversation with him? A. I showed him the packages and he took possession of them.

Q. He took the Government's Exhibits 8 and 12 for identification? A. That's right.

Q. And the powder contained in the packages at that time? A. Yes.

Q. Did there come a time after that when you saw Exhibits 8 and 12 for identification again? A. Yes, about three hours later.

(654)

Q. What happened on that occasion? A. Well, Mr. Bartlett gave it back to me and I initialled the packages.

Q. Then what did you do with them? A. And I took them in my possession and we left the ship and we proceeded to our headquarters at 54 Stone Street and I gave them to Captain Conroy, who was the duty captain at that time, and he put them in a brown envelope, tied them and sealed them. Then he put it into a safe.

Q. Did there come a time thereafter when you again saw the packages, 8 and 12 for identification? A. The following day.

Q. You received them back from Captain Conroy? A. From the duty captain at that time. That was May 7, in the morning.

Q. You had seen them sealed before when you previously submitted them, the day before? A. Yes, sir.

Q. Was the seal still intact? A. Yes.

Q. Did you see any evidence that they had been tampered with? A. No, sir.

(655)

Q. After they were returned to you on the 7th, what did you do with them? A. Then we proceeded to 201 Varick Street, U. S. Customs Laboratory, and I turned them over to Mrs. Garbutt, a customs chemist.

Q. Were they still in a sealed condition? A. Yes.

Q. What did you do then? A. Well, she took a test on it and waited, and then she returned them to me.

Q. You received them back from Miss Garbutt? A. Yes.

Q. What did you do with them thereafter? A. Then I took them down to our seizure room and I turned them over to Mr. O'Connell.

Q. Did you get a receipt? A. Yes.

Q. No. 3096? A. Yes.

Q. Did there come a time on June 15 of this year when you again—well, withdrawn.

Did there come a time on June 15 of this year when you received this bag, Government's Exhibit 6 for identification, from Mr. O'Connell? (656) A. Yes.

Q. Was that in a sealed condition at the time? A. Pardon me?

Q. Was it in a locked and sealed condition? A. The bag was sealed. It was stapled.

Q. What did you do with this bag after you received it from Mr. O'Connell? A. I gave them to you, sir.

Q. Now, in the course of your activities on the 6th in working aboard the vessel with Adams, did there come a time when Adams showed you anything? A. Yes. About 15 minutes later he came across a blue cloth package.

Q. I show you Government's Exhibit 13 for identification, and ask you if you recognize that? A. Yes.

Q. Is that the blue cloth that Adams showed you on that occasion? A. Yes.

Q. Where was this? A. Well, that was concealing the package that Mr. Adams found.

Q. I show you Government's Exhibit 10 for identification, and ask you if you recognize— (657) A. Well, I didn't see those, sir.

Q. You didn't? A. No.

Q. All right, sir.

Now, do you know when the contents of Government's Exhibit 8 for identification, these bags or packets that you found, were removed from these packets? A. Yes. Up in the customs laboratories.

Q. You saw the chemist remove— A. No, I didn't.

Q. You gave those to the chemist? A. Yes.

Q. Did you receive the packages back? A. Yes, and five bags, I think.

Q. Now I ask you to step down, Mr. McNamara, and look at Government's Exhibits 9-A, B, C, D and E for identification, and ask if those are the nine bags which you received from Miss Garbutt, the chemist. A. Nine bags?

Q. Five bags, I am sorry. A. Yes.

Q. And those are the bags that you submitted to Mr. O'Connell? (658) A. Yes, sir.

Q. What did you do with these? A. I submitted them, too.

Mr. Starkey: I have no further questions of this witness.

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(671) • • •

EDWARD ADAMS, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Starkey:

Q. Your occupation, sir? A. Customs Enforcement Officer, sir.

Q. How long have you been so employed? A. 15 years, sir.

Q. Were you on duty on May 6, 1958? A. Yes, sir, I was.

Q. What was your assignment on that date? A. I was assigned as a customs searcher, assigned to the Santa Maria on Pier 57, North River.

Q. With whom did you work on that date? A. With Officer McNamara.

Q. Now, I show you, sir, Government's Exhibit 13 for identification, and ask you if you recognize that. A. It looks like something I marked. Yes, sir, this is it.

(672)

Q. Where and when have you seen it before? A. On the date you mentioned, sir.

Q. May 6th? A. That's right, sir.

Q. Where? A. This cloth covered a package which I found back aft on the Santa Maria.

Q. I show you Government's Exhibit 10 for identification and ask you if you recognize that.

(No response.)

Q. You may take it out of the plastic case if you need to sir. A. Yes, sir, this is a part of that package, sir. This is my identification on there.

Q. A package which Government's Exhibit 13 for identification covered? A. Yes, sir.

Q. Now, after you made this discovery, Mr. Adams, what did you do? A. I notified the inspector in charge.

Q. Who was that? A. Inspector Levkulic.

Q. Did there come a time when you gave Government's Exhibit 10 for identification to Inspector (673) Levkulic? A. Yes, sir, we left it there where we found it, and Inspector Levkulic came and picked it up and brought it back to headquarters aboard ship.

Q. And did there come a time—and was it in the same condition then as it is now, or did it have something in it? A. There was contents of white powder in there, sir.

Q. Did there come a time when you received this package back? A. Yes, sir, about three hours later, when we were leaving the ship, Inspector Bartlett turned over that package to me to bring back to headquarters.

Q. And what did you do with it? A. We brought it back to headquarters at 54 Stone Street and the captain put a seal around that and he put it in the safe.

Q. Now, did there come a time when you received it again? A. Yes, sir, the following day we picked that

package up in the morning, we brought it over to the chemist.

Q. Was it sealed, in a sealed condition when (674) you again received it? A. Yes, sir, it was.

Q. Did you see any evidence that it had been tampered with? A. No, sir.

Q. You brought it to the chemist? A. Yes, sir.

Q. And what happened when you brought it—the chemist was Miss Garbutt? A. That's right, sir.

Q. What happened when you gave it to Miss Garbutt? A. She made different tests on it, and she returned the report with the packages, back to me, sir.

Q. Now, I show you Government's Exhibit 11-A and 11-B for identification, and ask you if you recognize them. A. These I don't think we marked, sir, but I see the chemist's mark is on there, sir.

Q. Well, have you seen them before? A. Yes, sir.

Q. Where and when? A. At the laboratory at the chemist's, sir.

(675)

Q. You received them from Miss Garbutt? A. That's right, sir.

Q. Along with Government's Exhibit 10 for identification? A. Yes, sir.

Q. And what did you do with it? A. We brought it downstairs to the seizure room, we got a receipt for it, and we turned it over to the seizure clerk down there, sir.

Q. Mr. O'Connell? A. That's right, sir.

Q. And you got receipt No. 3097? A. Yes, sir, 3097.

Q. I show you Government's Exhibit 7 for identifica-

tion, and ask you if you recognize it. A. Yes, sir, that I do, sir.

Q. Where and when have you seen that before? A. That we picked up Thursday. I think it was the 15th, from Mr. O'Connell.

Q. And was that envelope marked 3097? A. Yes, sir, the bag was stamped with the identification number on it.

Q. Was it locked closed? A. Yes, sir.

(676)

Q. Now I show you Government's Exhibit 12 for identification and ask you if you recognize that. A. This, from what I recall, is Officer McNamara's wrappings on the package.

Q. What do you mean his wrappings? A. Well, the package he found, sir.

Q. At the same time? A. No, sir. About, oh, 10 or 15 minutes before I found mine, sir.

Q. Do you recognize these packages? A. Yes, sir, I do, sir.

Q. Where and when did you see the one you looked at before? A. This here package right here, sir?

Q. Yes. A. Yes. That one, when officer McNamara first found it I was there with him and he called me to get Inspector Bartlett to pick up this package.

Q. Did you see him give them to Inspector Bartlett? A. Yes, sir. I was there when he picked them up.

Q. Did you see him receive them back? A. Yes, sir, he received them back when I (677) received mine.

Q. And he accompanied you to the duty captain? A. That's right, sir.

Q. Did you see him receive them back the next day? A. Yes, sir, I was with him then, too.

Q. Did you see him submit it to the chemist and get it back from the chemist? A. Yes, sir, I accompanied him at all times.

Mr. Starkey: No further questions.

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(682)

DANIEL J, O'CONNELL, was recalled and testified further as follows:

Direct examination by Mr. Starkey:

Q. Mr. O'Connell, when you testified previously I believe we understood you to say that the bags containing the white granular material which were submitted to your custody on May 7 were never opened; is that right? A. That's right.

Mr. Pogoda: May I object to the form of the question. He is including facts which this witness never testified to. "White granular." Mr. O'Connell never so testified.

The Court: All right, rephrase the question. I sustain the objection.

Q. I show you, Mr. O'Connell, or I ask you to come off the stand and I ask you to examine Government's Exhibit 11-A and B for identification, and 9-A, B, C, D and E for identification.

After you received them into your custody on May 7,

1958, can you state of your own knowledge whether or not they were ever opened again?

Mr. Pogoda: That was gone over and it is improper redirect.

(683)

The Court: I don't know the purpose of what you are trying to say. As I remember your testimony you said that you put them all in that big bag, didn't you?

The Witness: Yes, sir.

The Court: You put nine in one bag and ten in the other?

The Witness: Five in one bag and two in the other.

The Court: Five in one bag and two in the other, is that right?

The Witness: That's right.

The Court: And you sealed the bags, the large bags?

The Witness: Put a clip on them.

The Court: And then you put them in the vault?

The Witness: Yes.

The Court: And you did that on May 7?

The Witness: That's right.

The Court: And you took them out on June 15, 1961 and gave them back to Mr. McNamara?

The Witness: McNamara and Adams.

Q. Do you know if these bags were ever opened (684) in the meantime?

Mr. Somers: I object to that.

Mr. Pogoda: I object, your Honor, and ask the Court to——

The Court: I sustain the objection. The witness has already testified to this. He has already said that the bags, so far as he knows, weren't reopened.

Mr. Starkey: It is what I thought to be a misunderstanding in that regard either on my part or the witness' part that I sought to clarify at this time, and I ask the Court's leave to go into this briefly in order to clarify what I consider to be confusion.

The Court: We are getting more confused, but anyway, take the stand now. Now let's get on with this. We have been over it once.

Mr. Carluccio: If the Court please, I respectfully request that any further testimony in this regard be without the presence of the jury because of the reason of the motion that I wish to make, and I wish not to say anything that would be detrimental, but I feel that there should be a conference with counsel for the government and with (685) counsel for the defense, and I say it is germane to the reason why this gentleman is being brought back on the stand, and I will point out to your Honor at that point.

The Court: That is denied. Let's proceed.

By Mr. Starkey:

Q. Do you know whether these bags, sir, 6 and 7 for identification, were reopened? A. These bags were reopened.

Q. What was the purpose of them being reopened? A. For further investigation on the outer wrappers.

Q. On the outer wrappers? A. Yes.

Daniel J. O'Connell—for Government—Recalled—Direct

Q. Were the outer wrappers removed at that time? A. Yes, they were.

Q. Were these other bags, 9-A, B, C and D, touched at that time? A. No, sir.

Q. Were the wrappers put back on these bags? A. Yes.

Q. And the bags resealed? A. Yes, sir.

(686)

Q. Were 9-A through E touched or 11-A and B touched at that time? A. No, sir.

Mr. Starkey: That is the point.

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(700) * * * :

MICHAEL LEVKULIC, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Starkey:

Q. Your occupation, sir? A. Customs Inspector.

(701)

Q. How long have you been so employed? A. Ten years.

Q. Were you on duty on May 6, 1958? A. Yes, sir.

Q. Did there come a time on that date—what was your assignment? A. I was assigned to search a vessel at 57, North River, Santa Maria.

Q. Did there come a time on that date that you received some packages from customs enforcement officer Adams? A. Yes, sir.

Q. I show you Government's Exhibit 10 for identification, and ask you if you recognize that package?

Mr. Pogoda: I am assuming that all of the testimony about these packages, your Honor, will subsequently be tied in with this case and that they are being taken subject to connection.

The Court: Well, there is no question about that. They are not being offered in evidence yet at all, and of course they would have to be tied in with this case.

Mr. Pogoda: Except that they are never (702) admitted into evidence and I believe the defendants' rights have been prejudiced by this display of bags and intrigue.

The Court: I think we will have to reach that issue after the offer in evidence is made.

Mr. Pogoda: I was wondering if the Court wouldn't at this point direct Mr. Starkey to go forward in an effort to get them in evidence, that that would be a proper way before we go on any further with testimony which may be very prejudicial and have no bearing on the case.

The Court: I assume that Mr. Starkey is attempting to complete his chain, isn't that what you are trying to do?

Mr. Starkey: Yes, your Honor.

The Court: So perhaps we can get through with this quickly and then get a ruling as to their admissibility. All right, sir.

Mr. Starkey: I believe that question was not answered, your Honor.

The Court: Did you ever see them before?

The Witness: May I look at them, your Honor?

The Court: Surely.

(703)

The Witness: Yes, sir.

Q. Where and when have you seen that exhibit for identification before? A. This package was shown to me by Customs Enforcement Officer Adams back aft on the Santa Maria. He pointed the packages out to me and I picked them up.

Q. Did there come a time thereafter when you gave them to Inspector Barber? A. That's right, sir. I took the package and brought the package up to Customs Inspector Bartlett and turned them over to——

Q. Was Government's Exhibit 10 for identification in the same condition then as it is now or did it have something in it at the time? A. At the time that I received the package it was bulkier than it is now.

Q. Were you present when Inspector Bartlett gave Government's Exhibit 10 for identification back to Mr. Adams later that day? A. I can't recall.

Mr. Starkey: No further questions.

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(725) • • •

FREDERICK ARZT, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Starkey:

Q. You are a captain in the Coast Guard, Captain Arzt? A. That is correct.

Q. How long have you been in the Coast Guard? A. 32 years, sir.

Q. And what are your duties? A. Presently I am assigned as senior investigating officer of the United States Coast Guard, New York, New York.

Q. Now are you familiar with the records and method of keeping records of the Coast Guard? (726) A. You mean all records, sir, or specific records?

Q. Are you familiar with the method of keeping—well, particularly discharges of seamen? A. I am, sir.

Q. Do you have the records of the Coast Guard relating to certain seamen which you have been requested to bring to court today? A. Yes, sir.

Q. Do you have the discharges of Winston Massiah from 1956 through 1958 with you? A. Yes, sir.

Q. Do you have the discharges for the same years of Francis Torres, Mitchell Anfield, Jesse Colson, and Paul Ferdinand King with you? A. Yes, sir.

Q. Will you produce them, please?

(Witness complies.)

Mr. Starkey: I ask that the records of Mitchell Anfield be marked Government's Exhibit 16 for identification.

(Government's Exhibit 16 marked for identification.)

Mr. Starkey: I ask that the records of (727) Jesse Colson be marked Government's Exhibit 17 for identification.

(Government's Exhibit 17 marked for identification.)

Mr. Starkey: I ask that the photostat of a discharge of Paul King be marked Government's Exhibit 18 for identification.

(Government's Exhibit 18 marked for identification.)

Mr. Starkey: I ask that the discharge of Winston Massiah be marked Government's Exhibit 19 for identification.

(Government's Exhibit 19 marked for identification.)

Mr. Starkey: I ask that the discharges of Francisco Torres be marked Government's Exhibit 20 for identification.

(Government's Exhibit 20 marked for identification.)

By Mr. Starkey:

Q. I show you Government's Exhibit 16 through 20 for identification, Captain Arzt, and ask you if you recognize those as documents kept by the Coast Guard in the regular course of business. (728) A. Yes, I do, sir.

Frederick Arzt—for Government—Direct

Statement by Witness Arzt

Q. And is it the regular course of the activities of the Coast Guard on or about the time of the dates of those discharges to make and keep such records? A. Yes, sir, it is required by Federal Statute RS-4551.

Mr. Starkey: I will offer Government's Exhibits 16 through 20 for identification in evidence, your Honor.

The Witness: Judge, may I make a request for the Commandant?

The Court: Yes, sir.

The Witness: Sir, in the keeping of these records the original goes to the man and the only duplicate that the government has of a chronological record of every seaman's service aboard merchant vessels is the duplicate that has been marked for identification and that has now been proffered in evidence. If these go into the records, sir, the records of the Coast Guard are compromised insofar as these five men's records are concerned, and the Commandant has requested me to respectfully ask your Honor that if they go into evidence, would it be (729) possible that photostats be made of the records so that they could be returned to the Commandant.

The Court: All right, sir, we will substitute photostats if they are admitted into evidence. Are you finished with the witness, Mr. Starkey?

Mr. Starkey: I am, your Honor.

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(748) • • •

JOSEPH DE VITO, called as a witness, having been first duly sworn, testified as follows:

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(749) • • •

Direct examination by Mr. Starkey:

Q. What is your occupation, Mr. De Vito? A. Customs marine officer.

Q. What are your duties, sir? A. I effect the formal entrance and clearance of vessels in the foreign trade.

Q. Are you familiar with ship manifests, and the method of keeping ship manifest records? A. Yes.

Q. Is that part of your duties? A. Yes, sir.

Q. I show you Government's Exhibit 23 for identification and ask if you recognize that document? A. Yes, I do. This is the vessel's inward manifest.

Q. What vessel, and can you tell the jury—well, what vessel was covered? A. This is the American steamship Santa Maria.

Q. It is the manifest for what voyage? A. For the foreign voyage.

Q. When did it leave and when did it return? A. Well, to leave I wouldn't know the exact date. (750) This is arrival. I haven't got that information with me but it can be available.

Q. What is the arrival date? A. The arrival date is on May 7, 1958.

Q. Did it arrive May 7th or were those records cleared on May 7th? A. She was entered, formally entered on May 7th. Her actual arrival off quarantine is 1:05 p.m. of May 6, 1958.

Q. Is that manifest kept in the regular course of the business of your office? A. Yes, sir.

Q. And was it the regular course of business at or about the time of the arrival of this vessel on this particular voyage, to prepare and keep such a record? A. Yes, sir.

Mr. Starkey: I will offer this manifest, your Honor.

The Court: You might explain to counsel what the purpose of this is. You don't have to do it in front of the jury.

(Discussion off the record outside the hearing of the jury.)

Mr. Somers: No objection.

(751)

(Government's Exhibit 23 for identification received in evidence.)

Mr. Starkey: I would like to ask the witness several further questions insofar as the contents of the record is concerned, your Honor.

By Mr. Starkey:

Q. Mr. De Vito, do you know what a vessel of the United States is? A. Any vessel documented under the laws of the United States.

Q. The United States Registry? A. The United States Registry.

Q. Does that manifest show whether or not this vessel, the Santa Maria, is of United States Registry? A. Yes, sir, it does. It was registered at New York on January 5, 1950.

Q. Does that vessel show whether or not it was engaged in a foreign voyage at this time? A. Yes, sir.

Q. Was it a foreign voyage? A. It engages in foreign voyages.

Q. Do you see three pounds eight ounces 256 grains of cocaine or for that matter any amount of cocaine manifested or listed as part of the ship's stores?

(752)

Mr. Somers: I will object to that, your Honor. This apparently is predicated upon an expectation of a negative answer. I strongly object to that, your Honor.

The Court: On what ground?

Mr. Somers: On the ground that this is improper, simply improper.

The Court: Why?

Mr. Somers: Because this man is putting—the examiner is putting into the mouth of the witness, by this indirection, testimony that he never could get in otherwise. He is going to say no. He might just as well say 27 pounds of narcotics, is that on the manifest. The man will say no. But look how inflammatory that is to a jury, your Honor.

The Court: Well, how do you suggest that it be handled, sir?

Mr. Somers: He shouldn't say it. What does appear on that manifest. Let him read it. The jury can deduce from that whether or not this contraband was ever on that manifest.

The Court: That manifest has possibly hundreds of articles.

Mr. Somers: Well, that's the only way to do it.

(753) Certainly not like this.

Joseph De Vito—for Government—By the Court

The Court: That is overruled. Answer the question.

Did you study that manifest yourself sir?

The Witness: Yes, sir.

The Court: Did you go through it all?

The Witness: Just now, no.

The Court: Did you ever go through it?

The Witness: Yes, I have.

The Court: Did you go through it, after being instructed to look on the manifest and see whether or not there was any cocaine manifested?

The Witness: After being instructed, yes.

The Court: You did?

The Witneess: Yes.

The Court: Did you go through the whole manifest, article by article?

The Witness: Not article by article.

The Court: Well, how did you go through it?

The Witness: Through the store list where it was originally supposed to be manifested. Ordinarily they don't manifest in the cargo section of any narcotics.

Mr. Starkey: I think your Honor by one or two questions I can clear the matter up.

(754)

Q. Is there one list of ship's stores? A. That's right.

Q. Is any cocaine listed on the ship's stores? A. As far as I could see, none.

Q. Well, have you looked? A. I have looked. I just glanced a few minutes ago down in there and there is none here. There is narcotics but no cocaine as far as I can see here.

Q. In the ship's stores there are some narcotics? A. Some, yes.

Q. Among them is there any cocaine? A. No.

Q. What are the narcotics? A. Well, like morphine, morphine sulfur, and cocaine, but of course that is a medicine, more or less, but that is about all. As far as I know of narcotics, I don't know too much of narcotics.

Q. There is a listing there, is there not, giving the narcotics and the ship's stores? A. That's right.

Q. There is no cocaine in that listing? A. None. None listed.

Q. Now, will you look at the manifest and insofar as you have examined it there is no cocaine (755) manifested? A. Yes, sir.

Q. Have you looked at the discrepancy sheet? Do you know what a discrepancy sheet is? A. Yes, sir.

Q. What is a discrepancy sheet? A. A discrepancy sheet is stuff that is manifested but not found. That is stuff that is not manifest or manifest but not found. That is the discrepancy sheet. As articles that are noted on here that were not found or was manifested and not found.

Q. And will you read to the jury what was found but not manifested on this voyage, according to the discrepancy sheet. A. Manifest but not found——

Q. No, found but not manifest, sir. A. Found but not manifested. Well, according to this there is one box of engine parts, four cases of machinery, five packages of powder containing narcotics, and two packages of powder containing narcotics.

Mr. Starkey: No further questions.

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(1127)

FRANK TORRES, called as a witness by the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Starkey:

Q. Do you know Jesse Colson, Mr. Torres? A. Yes, I do.

Q. First, have you ever been convicted of a crime? A. Yes.

Q. How many times? A. Twice.

Q. When and for what crimes? A. 1951 and 1952.

The Court: Keep your voice up, please.

A. 1951 on a marihuana charge, and in 1952 for possession of heroin.

Q. Now, I refer you to August of '57 and ask you if there came a time in that month when you saw Jesse Colson? A. Yes. I took the ship Santa Maria in August '57. I met him in the company offices.

Q. Do you know what part of August it was? A. In the doctor's office.

Q. What part of the month of August, do you (1128) recall? A. August 27 or 28.

Q. And you saw him in the doctor's office? A. Yes.

Q. Where was that? A. That is in the Grace Line pier.

Q. Did you have a conversation with him? A. Yes.

Q. What did he say and what did you say? A. He said he was taking a trip off, that I should wait for him until he got back on because he had a connection of cocaine.

Q. Did he say where? A. No, not at the time, no.

Q. What did you say? A. I said I would wait until he got back on again.

Q. Was there any conversation about when that would be? A. At the end of the trip.

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Q. How long does a trip take? A. 38 days.

Q. Do you know Winston Massiah? A. Yes.

(1129)

Q. Do you see him in the courtroom? A. Yes.

Q. Will you point him out, please.

The Court: Tell us where he is sitting.

A. Right behind the DA on the right.

Mr. Starkey: May the record now show, your Honor, that he has identified the defendant Massiah?

The Court: All right, proceed.

Q. When did you first see Massiah? A. On board the ship.

Q. On this voyage? A. Yes.

Q. When did the ship get back? A. October 8.

Q. Did there come a time thereafter when you saw Colson again? A. Yes.

Q. Where? A. When we got back from the trip on the ship.

Q. He came aboard the ship? A. Yes, sir.

Q. Did you have a conversation with him? A. Yes.

Q. What did he say and what did you say? (1130) A. I told him I was getting off the ship.

He told me if I wanted to invest the money I had, give it to him so he could invest it for me.

Q. What did you say? A. I told him no.

Q. Was there any further conversation? A. Well, he told me that I should wait until the next trip when the ship got back, that he had a man bringing some stuff for him.

No, excuse me. He said to wait until he got back.

Q. Until he got back? A. Until he got back and we could talk business then.

Q. What kind of business? A. The cocaine business.

Q. Did you talk to anyone about this conversation with Jesse Colson? A. Yes.

Q. Who was that? A. A friend of mine.

Q. Did there come a time when you and that friend again saw Colson? A. Yes.

(1131)

Q. When was that? A. The date I can't recall very well.

Mr. Carluccio: Your Honor, at this point could he kindly say the friend's name, the place, and he doesn't know the time, but if he has the friend's name and the place of this conversation, I would like to have it.

The Court: Suppose you tell us the friend's name and the place.

The Witness: Jimmy Torrens.

Q. Mr. Torres, I show you Government's Exhibit 21, the next to the last page, and I ask you to look at that and see if that refreshes your recollection as to when you next saw Jesse Colson.

Mr. Carluccio: Objection. Completely leading, your Honor. I don't think he could give him the information and tell him to pick out when he next saw Jesse Colson.

The Court: That is overruled. I think it is proper direct examination.

Let the record show that this exhibit shows the sailings of this witness on the Santa Maria.

Is that what it shows?

The Witness: Yes.

(1132)

The Court: Is it your sailings or Colson's sailings?

The Witness: Colson's.

The Court: All right. Yes.

The Witness: Yes, I see it. November 18.

Q. Of what year? A. of '57.

Q. Where did you see Colson on that day? A. On the ship.

Q. Who was present? A. Only me, only us.

Q. Who? A. Colson and me.

Q. Where was Torrens? A. He was in the messroom.

Q. Did you have a conversation with Colson? A. Yes.

Q. What was said on this occasion? A. That he had brought a load, that I should call him up that same night at his house.

Q. Did you see anybody else you knew aboard the ship at this time? A. No.

Q. Did there come a time when you did go up (1133) to his house? A. Yes.

Q. When was that? A. The same day.

Q. With whom did you go up there? A. Beg your pardon?

Q. With whom did you go there, with anyone? A. With Torrens.

Q. You had a conversation with Colson at that time? A. Yes.

Q. What was said on that occasion? A. He had some samples which I tasted.

Q. Samples of what? A. Cocaine.

Q. How did it taste? A. Bitter.

Q. What was said? A. He said it would cost us 500 cash and 600 if credit.

Q. 500 in cash and 600 if credit? A. Yes.

Q. What did you say? A. I told him I only had 300, and I would pay (1134) him the 300 later on.

Q. Did he make delivery at that time? A. The day after.

Q. Do you know why he didn't make delivery at that time? A. He didn't have it in his house, I guess.

Q. Where did he make delivery? A. The day after.

Q. Where? A. In my house.

Q. What did he give you? A. An ounce.

Q. Is that scale weight? A. No. 16 spoons.

Q. Are you familiar with the appearance of cocaine? A. Yes.

Q. What does it look like? A. Sugar or salt.

Q. And have you used cocaine? A. Yes.

Q. On about how many occasions, would you say? A. Quite a number of occasions.

Q. When did you begin? (1135) A. About 1950.

Q. How did you use it when you used it, needle or snort? A. Snort.

Q. Just snort? A. Yes.

Q. You are familiar with the effect of cocaine upon you when you use it? A. Yes.

Q. Did you use any of this? Did you use any of this delivery of Colson's? A. Yes.

Q. Do you know whether or not it was cocaine? A. It was.

Q. Now, did there come a time thereafter when you again talked to him about cocaine? A. That was the end of December. No. I saw him again a week after that.

Q. What happened on that occasion? A. I took a quarter of an ounce.

Q. Where? A. In his house.

Q. How much did you pay for it? A. $125.

(1136)

Q. Did you use any of that? A. Yes.

Q. Do you know whether or not it was cocaine? A. It was.

Q. Did you see Colson thereafter? A. Yes. I saw him again but it was a week after I saw him and he had no more.

Q. What did he say? A. He said he was waiting for another shipment that a friend of his was going to bring over.

Q. Now, did there come a time when you again met the Santa Maria? A. Yes.

Q. When was that? A. The end of the year. Late December.

Q. The end of the year. Late December. A. What happened? Did you go aboard? A. Yes.

Q. What happened when you went aboard? A. I was approached by Winston.

Q. Massiah? A. Massiah.

Q. What was said? A. He asked me how many pieces did I want.

I told him I didn't know what he was talking (1137) about.

Q. How many what? A. How many ounces.

Q. Yes? A. I told him I didn't know what he was talking about.

Then he said Colson had informed him what was going on between us.

Q. What did you say?

Mr. Carluccio: May a date be fixed with reference to this?

Mr. Starkey: The witness said it was the end of December.

Mr. Carluccio: Your Honor, I would like the witness to say it.

Mr. Starkey: The witness said it.

The Witness: December 30.

The Court: The 30th of December.

Mr. Carluccio: Your Honor, I object to counsel leading the witness. I remember that he said the end of the year and counsel used the word "December," and I object to any further leading questions. I would like the record to be clear. What date does he say it was?

(1138)

The Court: He said the 30th of December.

The Witness: Late December. December 30.

Q. Now, will you give that conversation, Mr. Torres? A. Beg your pardon?

Q. The conversation you and Massiah had at this time. A. He approached me and he asked me how many ounces I wanted.

I told him I didn't know what he was talking about.

He said that Colson had told him what was going on between us two.

Q. What did you say to that? A. I didn't say anything. I still said I didn't know what he was talking about.

Q. Was there anything further said? A. No, nothing else.

Q. Did you just part company? A. No. We went to a telephone and called Colson.

Q. At whose suggestion? A. At his suggestion.

Q. And what happened after that? (1139) A. Well, Colson came to my house the day after that.

Q. Was there any conversation between anyone and Colson, or between you and him at the time of the call? A. At the time of the call we talked to Colson on the telephone, and he said he would deliver or he would see me the day after in my house.

Q. And did you see him after that? A. Yes.

Q. Where? A. In my house.

Q. What was the conversation, if any? A. He wasn't satisfied the way Winston was running the business, that if I should get on the Grace Line ship I would take over his job.

Q. Was there anything else said? A. He also said how I should keep if in my locker, when the ship left Valparaiso, and then transfer it to the back of the ship, to the stern, before it hit New York.

Q. Was there anything else said? A. No, nothing else.

Q. Do you recall the conversations?

(1140)

Mr. Somers: I beg your Honor's pardon. I am having great difficulty in hearing Mr. Torres.

The Court: All right. Would you keep your voice up, please.

The Witness: Yes, sir.

The Court: All right, sir. Ask your question.

Q. Do you recall anything about bringing it ashore?

Mr. Carluccio: Objection, your Honor. There is no testimony about bringing it ashore. He is lead-

ing the witness again, your Honor. I object to counsel leading the witness.

Mr. Starkey: The witness testified, your Honor, that his memory was exhausted.

The Court: I will overrule the objection.

Was there any conversation about bringing it ashore?

The Witness: Yes. He said a longshoreman would contact me and I should give it to him to bring it ashore.

Q. Can you recall any other conversation at that time? A. Not at that time, no.

(1141)

Q. Do you recall if there was any conversation about the events of the previous day? A. I can't recall.

Q. Did you transact any business with Colson on this occasion? A. Not on this occasion.

Q. You did not? A. No.

Q. Did there come a time thereafter when you saw him again? A. I saw him about a week after that.

Q. And what happened on that occasion? A. He brought me half an ounce of cocaine on consignment.

Q. Did there come a time when you paid him for it? A. Yes.

Q. How much did you pay him? A. $300.

Q. Did you use any of this? A. Yes.

Q. Did there come a time when you saw him after that? A. The week after he brought me another half an (1142) ounce.

Q. What did you do with that? A. Well, I disposed of it.

Q. Did you use any of it yourself? A. Yes.

Q. Did you ever do business with Colson after that occasion about which you just testified?

Mr. Pogoda: Objected to as to form, and for the further reason that this witness is not named in the indictment as a defendant or a co-conspirator, nor is there an allegation of any overt act, that these defendants are called upon to meet with respect to this witness, and I submit, sir, that the entire line of questioning about his transactions or business with Colson is inadmissible, and not part of this case, and certainly is not required to be met by the defendants.

The Court: Overruled. Proceed.

(Question read.)

A. At the beginning of April he brought me another half an ounce. I wasn't satisfied with what he brought me so he lowered the price to $225.

Q. What was the conversation about the half ounce that he brought you? (1143) A. He said somebody must have been fooling around with it because it wasn't supposed to be what he wanted.

Q. Did he say who it was? A. No.

Q. Did you use any of this delivery? A. Yes.

Q. Were all of these deliveries cocaine? A. Yes.

Q. Was there any agreement as to payment for Colson on this last occasion? A. No.

Q. Did you ever pay him? A. No.

Mr. Starkey: No further questions.

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(1144) • • •

Cross examination by Mr. Carluccio:

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(1160) • • •

Q. Would you tell me how this person Torrens (1161) figured into your negotiations and dealings between yourself and Colson? A. He was my partner.

Q. He was your partner? A. Yes.

Q. Well, what do you mean by he was your partner? In what enterprise, in what business was he your partner? A. Well, I asked him to put up half of the money the first time we bought anything from Colson.

Q. What else? A. That's the only time he had anything to do with it.

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(1166) • • •

Cross examination by Mr. Pogoda:

Q. Mr. Torres, the cocaine you bought from (1167) Colson wasn't for your use alone, was it? A. Beg your pardon?

Q. The cocaine you bought from Colson wasn't alone for your use? A. No.

Q. You were going to push it, weren't you? A. Yes. Some of it.

Q. You were a pusher in this narcotic trade, were you not? A. Yes.

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(1263) • • •

WARDNER H. BARTLETT, called as a witness on behalf of the government, being first duly sworn, testified as follows:

Direct examination by Mr. Starkey:

Q. What is your occupation, sir? A. I work for the Treasury Department, Bureau of Customs.

Q. What is your title? A. Supervisory Customs Enforcement Officer.

Q. How long have you been so employed? A. I have been in this title one year.

Q. What are your duties as a customs enforcement officer? A. I am in charge of the searching of vessels.

Q. I show you Government's Exhibit 25 for identification and ask you if you recognize these documents. A. These documents here include declarations. Each crew member makes out a declaration of his imports.

Q. Are you familiar with the appearance of such records? A. Yes, sir.

(1264)

Q. How long have you been dealing with them? A. Ten years.

Q. Are you familiar with the procedure of the execution, preparation and maintenance of those records? A. Yes, sir.

Q. Do you know if they are prepared in the regular course of the operations of customs? A. They are, sir.

Q. Is it the regular course on or about the entry of a specific ship for such documents to be made and kept by customs? A. It is. It is part of the entry.

Mr. Starkey: I offer these documents, your Honor.

The Court: Let counsel see them.

While they are looking at them go on to something else.

Q. Were you on duty on May 6, 1958? A. Yes, sir.

Q. What was your assignment on that date? A. I was assigned in charge of the search of the Santa Maria.

Q. Did there come a time later on that day when you took any packages into your custody? (1265) A. Yes, sir.

Q. How many packages did you receive? A. On the first occasion I received five packages.

Q. From whom did you receive them? A. From Mr. McNamara.

Q. Now I show you Government's Exhibit 8 for identification and ask if you recognize the contents. A. Yes, sir.

Q. What? A. Yes, sir.

Q. Where and when have you seen them before? A. On May 6 I saw them for the first time in the aft peak of the Santa Maria.

Q. Who called your attention to them? A. Mr. McNamara.

Q. I show you Government's Exhibit 10 for identification and ask if you recognize those items? A. Yes, sir, I do.

Q. Where and when have you seen that before? A. I saw it on the same day, approximately 15 or 20 minutes after I saw the first packages.

Q. Was it Inspector Levkulic who gave you Government's Exhibit 10 for identification? (1266) A. Yes, sir.

Q. Were these packages, Government's Exhibits 8 and 10 for identification in the same condition as they appear now in the courtroom or did they have something in them

at the time? A. They had a white powder in each one of the containers.

Q. Now I show you Government's Exhibits—I show you first of all Government's Exhibit 13 for identification and ask you if you recognize that cloth. A. Yes, sir.

Q. Where and when have you seen that before? A. I saw it on May 6, 1958. This cloth wrapped up—Adams' seizure.

Q. The packages which you were just shown? A. Right. The last one. The two packages within one. The smallest of the two.

Mr. Carluccio: Will counsel mention the exhibit number of Adams' seizure?

Mr. Starkey: 11-A and B for identification.

Q. Government's Exhibit 13 for identification, was that in the same condition as you see it now? A. Yes.

Q. Was it pulled apart, flat? (1267) A. No.

Q. How was it? A. It was wrapped around the packages, held by a piece of tape.

Q. How was it secured? A. By a piece of tape, adhesive tape.

Mr. Starkey: I believe in regard to Adams' seizure this witness was only shown 10 for identification. 11-A and B are the contents.

Mr. Carluccio: For clarification of the record, is it that No. 13—it covered what exhibit?

Mr. Starkey: 10 for identification and 11-A and B.

Mr. Carluccio: That cloth, 13, covered 10, 11-A and 11-B, is that right?

Mr. Starkey: That's right.

Q. How was the rag secured? A. By a piece of adhesive tape.

Q. Do you see the tape? A. Yes, sir.

Q. Now, what did you do with the package which was secured with tape at that time after it was given to you? A. When that was brought to my attention, I (1268) pulled the end of this cloth from the package and from the package I ripped a corner of it so that I could take a test of the contents.

Q. And did you take such a test? A. I did, sir.

Q. What kind of a test was it? A. We have a reagent, a marquis reagent.

Q. For what drug is that a test? A. For opium or its derivatives.

Q. Including heroin? A. Yes, sir.

Q. Do you know whether or not the marquis reagent reacts with cocaine? A. It didn't, sir.

Q. Do you know whether or not a marquis reagent does react with cocaine? A. It will not with cocaine.

Q. So from that you learned that the contents were not heroin, is that right? A. That's right, sir.

Mr. Starkey: May I have the Court's indulgence for one moment?

The Court: Yes.

(A pause.)

(1269)

Q. Now, what did you do with the rag covering the blue rag which you have before you, Government's Exhibit 13 for identification? A. That rag right there, sir?

Q. Yes. A. What did I do?

Q. Well, at the point of the testimony you have reached it was still taped and secured. A. Yes.

Q. What did you do then, did there come a time when you took it off? A. There did, sir.

Q. Did you tear the tape at all when you took it off? A. No, I just lifted the end of the tape. It wasn't ripped.

Q. Did there come a time——

Mr. Carluccio: I didn't hear that.

(Question and answer read.)

Q. And you took it off the package? A. Yes, sir.

Q. Now, did you see any tax stamps on the package or on this at that time? A. No, sir.

(1270)

Q. Now I show you Government's Exhibit 12 for identification, and ask you if you recognize that rag? A. I do, sir.

Q. Where and when have you seen that before? A. I saw it on this same day, May 6, back aft, in the after peak, which partially covered Mr. McNamara's seizure.

Q. And those were the five packages? A. Yes, sir.

Q. Which you have identified as Government's Exhibit 8 for identification? A. Yes, sir.

Q. Did you take custody of that rag also? A. I did, sir.

Q. Now, do you know whether or not these seizures were given numbers? A. The seizure is given numbers.

Q. Do you know what the numbers were that were given to these seizures? A. On these particular ones I don't know, but up in the upper right-hand corner on the tag on the seizure, the numbers come from the money and accounts division, they issue them.

(1271)

Q. Do you have any information with you? A. I have some information with me.

Q. Will you check that? A. If I may look at it, yes.

Q. You told me yesterday what the seizure number was, did you not, Inspector? A. Right.

Mr. Pogoda: I didn't know the witness was on the stand yesterday.

Mr. Starkey: No. I am talking about in my office.

The Witness: McNamara's number was 22155. Adams' was 22156.

Q. All right, sir. Did there come a time, then, when you saw tax stamps on either Government's Exhibit 8 or Government's Exhibit 19 for identification, in these containers? A. No, no tax stamps at all, sir.

Q. Did you see tax stamps on the outer covering, either rag, Government's Exhibits 13 and 12 for identification? A. No, sir.

Q. Now, did you maintain custody of the seven packages and the two rags which you have identified? (1272) A. Yes, sir.

Q. Did there come a time when you went to the duty captain with them? A. Yes, sir.

Q. In whose company? A. Mr. McNamara and Mr. Adams.

Q. And this was when? A. This was approximately four hours after the seizure.

Q. Where is the duty captain located? A. 54 Stone Street.

Q. And what did you do at that time? A. The captain wrapped them with cord and sealed them and put them in the safe.

Q. The packages and the covers? A. Right.

Q. That is to say the two rags and the containers themselves? A. Yes, sir.

Q. And were they in the same condition at that time as when you found them? A. They were, sir.

Q. Or when you received them, I should say. A. Yes.

(1273)

Q. With the exception of the fact that the rags had been taken off, is that right? A. That's right, sir.

Q. The tape was in the same condition as it was while it had been taped on? A. Yes, sir.

Mr. Carluccio: Objection. Two questions there and I move to strike the answer, the one about the tape and the other one about whether the rags were taken out. His first testimony was that both of them were in sealed objects, and I submit it's important to this case.

The Court: I overrule the objection. Perhaps you can clarify them on cross.

Q. And you saw the duty captain seal them at that time with Adams and McNamara present? A. That's right, sir.

Mr. Starkey: I have no further questions.

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(1278) • • •

HELEN GARBUTT, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Starkey:

Q. What is your occupation, Miss Garbutt? A. I am a chemist at the Customs laboratory.

Q. How long have you been so employed? A. 18 years.

Q. Will you tell the Court and jury what your educational qualifications are for this position, Miss Garbutt? (1279) A. I have a Bachelor's degree from Bucknell University.

Q. From what university? A. Bucknell.

Q. Do you have any other post-graduate training or have you read any matter dealing with your subject since then? A. Yes. I studied many books on the subject.

The Court: How long have you been a chemist?
The Witness: 28 years.
The Court: Your degree was in chemistry?
The Witness: Yes.
The Court: I will accept it. Let's proceed.

Q. Are you familiar with the chemical properties of cocaine hydrochloride? A. Yes, I am.

Q. Have you ever tasted cocaine hydrochloride? A. Not exactly tasted it. I touched it to the tip of my tongue.

Q. What is the flavor, or what is— A. It's very bitter and it numbs the tongue.

Q. It numbs the tongue? A. Yes.

(1280)

Q. Are you familiar with whether or not it is soluble in water? A. The salts of cocaine are soluble.

Q. Does that include cocaine hydrochloride? A. Yes, it does.

Q. Can you tell the Court and jury what the effect on the appearance of water would be with the addition of a quantity of pure cocaine hydrochloride? A. It would dissolve forming a clear solution.

Q. Would it change the appearance of the water in any way? A. No.

Q. Now, were you working on May 7, 1958? A. I was working at the customs laboratory.

Q. Now I show you Government's Exhibit 10 and 8 for identification and ask if you recognize those exhibits. A. Yes. These appear to be the wrappings that were around samples of white powder that I received that day.

Q. Did you mark them in any way? A. Yes, my initials are on here.

Q. And that goes for each package? A. Yes. They are all initialled.

(1281)

Q. You received them from Officers McNamara and Adams? A. Yes, I did.

Q. Now, were they in that condition or did they have anything in them at the time? A. Yes. They had white powder in them.

Q. What did you do with the powder? A. I took it out and weighed it, and analyzed it and found that it was cocaine hydrochloride.

Q. What was the weight? A. The contents of this package weighed one pound, one ounce and 40 grains, and the total contents of these packages were two pounds seven ounces, 216 grains.

Q. For a total of approximately three pounds eight ounces and 156 grains? A. Yes.

Q. Now, after you removed the cocaine from these packages did there come a time when you returned the packages to Officers McNamara and Adams? A. Yes, I did.

Q. Now I also show you—and Miss Garbutt, I would impose upon you at this point to step off the witness stand for this examination because I don't (1282) want to handle these packages any more than necessary. I show you Government's Exhibits 9-A through E and ask you to examine them and ask you if you recognize them. A. These all have my initials on them. These are the bags in which I put the powder after I removed it from the taped packages.

Q. And I show you 11-A and 11-B for identification and ask you if you recognize them. A. These are the two packages that came out of that one largest taped package.

Q. This one marked Government's Exhibit 10 for identification? A. That's right.

Q. And did you return the whole group of exhibits, the outside packages and the paper bags containing the cocaine, to Adams and McNamara? A. Yes, I did.

Mr. Starkey: I offer, your Honor, Government's Exhibits 6, 7, 8, 9-A through E, 10, 11-A and B, 12, 13, for identification in evidence.

The Court: You are offering them in evidence?

Mr. Starkey: Yes.

Mr. Pogoda: If the Court please, the (1283) defendants respectfully object to the admission of these exhibits in evidence because there has been no connection shown between any of the exhibits here and any of the defendants and I speak especially for the defendant Anfield.

Defendants' Objection to Admission of Certain Exhibits and Motion to Deny Admission

The Court: Well, the Court overrules the objection and admits them in evidence on the basis of the conspiracy allegation in the complaint.

Mr. Pogoda: Do I understand, your Honor, that they don't apply to Counts 1 and 2 of the indictment?

The Court: Well, at the present time the Court is admitting them with reference to the conspiracy count in any event.

Mr. Carluccio: Your Honor, I object for other reasons, and the reasons are, I would rather not discuss them before the jury. It is a legal question at this point, your Honor.

The Court: Just go right ahead and state them.

Mr. Carluccio: All right, fine.

Well, my point is that these two exhibits, which were maintained by the Government and stated to be in one of the Government's stores all during the time (1284) from May, approximately May 15, up until the present time, I move that these exhibits not be admitted into evidence because they were not in the Government's stores with particular attention to Exhibit 13 in evidence, the reason being that a motion was made for discovery and inspection which was granted by Judge Dimock as a matter of record before the Court that—the order was signed by Judge Dimock on 11/7/58, November 7, 1958, and filed on November 10, 1958, your Honor and pursuant to that order I examined that blue cloth and I examined what the Government had told me was the packages involved in this case, and in my examination—it took place, according to the best notes in my diary, somewhere

in December of '58—and I maintain that this evidence was not in the care of the government during the time it was in the vault, as they maintain, but however, it was taken back and forth and therefore the predication and the foundation based upon the introduction is faulty and for that reason I move that that specific cloth, which is 13, shouldn't be admitted into evidence on the record and on my statement as to the inspection by myself.

The Court: The Court will accept your (1285) statement but the Court denies your motion and admits them. The witness has specifically identified those particular exhibits as being found in this shipment.

Let's proceed. Any further questions of this witness?

Mr. Starkey: Well, your Honor, may I just state for the record that the witness Garbutt specifically stated that these cloths weren't in the packages which she identified and since this application was made before the jury——

The Court: The only question was whether or not these exhibits were taken off the ship and several witnesses have looked at these and said that these were easily identifiable and were specifically the ones that were found, so with reference to the cloths, we have no question of custody really. The only question of custody which is where you have identifiable material, and that is particularly in connection with the powder materials that are homogenous and can't be identified.

Any further questions?

Denial of Motion to Deny Admission

Mr. Carluccio: Just again for the record, and on the other question of the packages, I submit that also with the custody, that there is a break in the (1286) chain because of the testimony of Mr. Bartlett which was that he gave them to Mr. Conroy, and yesterday we had Mr. O'Connell saying that he stored them in his vault.

Mr. Starkey: Your Honor, since this is in front of the jury I object to a characterization of the testimony. Those witnesses testified that they gave it to the duty captain, the next day they brought it to the chemist and after leaving the chemist they then gave it to the deputy collector O'Connell. The chain is a perfect one.

The Court: I will deny the motion. Let's proceed.

Mr. Somers: Your Honor, I object to the introduction of the bags in evidence and the material offered by Mr. Starkey at this time as against my client Aiken, because there is absolutely no testimony on the first day of the case linking my client with any of the people associated with it. The testimony, so far as Aiken is concerned is that he had some dealings through school boy in narcotics, not these particular nartcotics, concerning—and there is no proof here that the narcotics that may have been the subject matter of these alleged deals were—with (1287) school boy were in fact the narcotics that all of these people participated in bringing in, and for that reason I submit as against Aiken this shouldn't be admissible.

The Court: I will deny the motion. I am permitting them on the conspiracy count.

Motion by Defendant Massiah to Deny Admission—Denied

Mario Cozzi—for Government—Direct

Mr. Archer: I move at this time, your Honor that the packages of narcotics are not admissible as against the defendant Thorn. Nowhere in all the testimony that has been adduced here in court is there any connection that this defendant Thorn was with the seaman, or that the defendant Thorn had anything to do with the conspiracy or anything to do with the narcotics. There was some testimony that he uses the stuff by Sylvia Ferris, but other than that there is no connection with the defendant Thorn.

The Court: That is denied. I will admit it under the conspiracy count.

* * * *

(1302) * * *

Mario Cozzi, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Starkey:

Q. What is your occupation, Mr. Cozzi? A. I am a customs agent employed by the Bureau of Customs, Treasury Department.

Q. How long have you been so employed? A. As a customs agent, since 1953.

Q. Now, Agent Cozzi, were you on duty on May 6 of 1958? A. Yes, sir.

Q. Did there come a time on that date when you boarded

the S/S Santa Maria at Pier 57, North River? A. Yes, sir.

Q. Where did you go after you boarded the ship? (1303) A. I went up to the vicinity of a mess hall that was set up as a searching squad headquarters and met several customs officers there, and I also spoke to them about what went on aboard the ship.

Q. Now I show you Government's Exhibit 27 for identification and ask you if you recognize that item. A. Yes, sir.

Q. Where and when had you seen it before? A. I found that in a locker on board the S/S Santa Maria on the evening of May 6, 1958.

Q. Do you know whose locker it was? A. Yes, sir. Winston Massiah, a seaman employed aboard that vessel.

Q. Did you have a conversation with Massiah about that tape? A. Yes, sir.

Q. What did he say and what did you say? A. After I found this tape I talked to Winston Massiah and I asked him if this was his tape. He stated that it was his tape.

I asked him what he used it for. He said—first I asked him where did he get it. He said he bought it in South America.

(1304)

And then I asked him "What did you use it for?" He said, "I sprained my left wrist."

Then I asked him, "Isn't it true that you used this to secure the package of cocaine that were seized up here today?"

And he didn't make any reply to that last question.

Q. Now, did you examine the tape, Agent Cozzi? A. Yes, sir.

Q. What did you ultimately do with the tape? Did you retain it in your custody or did you give it to someone else? A. First of all, I scratched my initials into this side of it, "M.C. 5/6/58," and I showed Murphy it on the ship and then I turned it over to my office at 201 Varick Street, New York, New York.

Q. And when you turned it over to him was it in the same condition that you found it? A. Yes, sir.

Q. Will you open the tape up, Agent Cozzi, and will you tell us now, the tape inside is in the same condition, at least the end of the tape inside is in the same condition as when you found it? A. To the best of my recollection and belief, (1305) that appears to be in the same condition with the——

Q. All right, sir— A. Incidentally, I also initialled the inside of it, too. I forgot to mention that.

Q. I show you Government's Exhibit 28 for identification— A. Excuse me. This wasn't cut out when I found it. You asked me if it was in the same condition. These cut-outs—when I found the tape it was solid.

Q. Those patches weren't cut out at the time? A. These patches weren't in it when I found it.

Q. The end, though, is what I asked you about specifically. A. Okay.

Q. And that is in the same condition? A. Yes, the end appears to be in the same condition.

Mr. Starkey: I offer Government's Exhibit 28 for identification in evidence.

Q. And I show you Government's Exhibit 28 and ask you if you recognize those documents.

Mr. Carluccio: Your Honor, before we get to 28 may I question the witness——

(1306)

The Court: I won't rule on the offer until you have had a chance to examine it.

Mr. Carluccio: All right.

A. Yes, sir. These are documents that were brought in by a girl named Elita Lloyd, asking to have some baggage that was detained.

Q. Both documents? A. No. One is a customs document and one is a letter, a note. I will read it:

"To whom it may concern:

"Please deliver to Miss Elita Lloyd two bags, i.e., one suit case, one handbag, one blanket. Contained in either suitcase should be articles declared by me before the ship arrived in New York."

And it is signed by Winston Massiah.

Q. Do you recognize the signature and his writing? A. Well, I accepted it as his writing.

Q. Now I ask you to look at the next document and ask you if you recognize that. A. Yes, sir. This is a memorandum receipt that is used here by the Bureau of Customs in New York locally, and it's titled, "Memorandum of Valuables (1307) Shipped," and it's made out for the payment of $7.09 covering customs declaration No. 35760, re Winston Massiah, and I believe it is 1914 East 128th Street, New York City, for the S/S Santa Maria, arrival of 5/6/58.

Q. And the document you have before you is a copy of a receipt you made at that time? A. Yes, sir. It is in my

handwriting, and it's stamped "Paid" by the customs cashier.

Q. Was that document prepared in the regular course of business? A. Yes, sir.

Q. Was it the regular course of business on or about the time of the date thereon for that receipt to be prepared? A. Yes, sir. When you say the regular course of business, the regular course of business on a transaction such as this would be that duty would be collected on the pier on the day of arrival or the day after, whenever the seaman would come out and clear his curios. This is in line with the regular order of business with the exception that his baggage and all his effects were removed and that he was arrested on the vessel and taken to our office for further investi- (1308) gation.

Q. Well, that is to say, it was prepared in the regular course of the operations of the customs bureau? A. Yes, sir.

Q. Who prepared that receipt? A. I made out the receipt but a custom inspector examined and assessed the duty on the articles that were passed and released to the bearer that presented this note.

Q. Well— A. And I was there when this was taking place.

Q. Was there another document there at that time? A. Yes. There was a customs crew declaration. I believe it is customs form 5129.

Q. Did you see that document? A. Yes, sir.

Q. And it was—was there any connection between that receipt and the crew man's declaration? A. Yes, sir. I noted that the number of the customs crew declaration up here in the upper left-hand corner, No. 35760 and then I wrote "Re Winston Massiah, 19 East 128 Street, New York City."

Q. And it was the items listed on that crew (1309) man's declaration that this receipt was prepared for the payment of the duty? A. That's right. Here is the set-up. This receipt accompanies that declaration and it goes down to the cashier's office in the custom house where they put another number on it. And this is a receipt that we kept to show that the money that was collected from this person for this declaration in our office—in other words, there was some sort of a tangible receipt that we had to show that was cleared.

Mr. Starkey: All right, sir. I will offer this in evidence.

Q. When you issued this receipt did you receive payment at that time for duty on three pounds or more of cocaine? A. No, sir.

Mr. Starkey: No further questions.

Cross examination by Mr. Carluccio:

• • • •

(1330) • • •

Q. Then what else did you ask him with reference to the tape? A. I asked him where he bought it. He said "I bought it in South America."

I said, "What did you buy it for?"

He said, "I sprained my left wrist." And he didn't have any tape on his left wrist.

I says, "If you sprained your left wrist how come you don't have any on?". So then I said, "What are you kidding me? This is what you used to wrap the cocaine in."

Q. And he denied it? A. He didn't answer.

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(1350) • • •

FRANCIS R. LOGAN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Starkey:

Q. What is your occupation? A. I am a textile technologist.

Q. How long have you been so employed? A. 30 years.

Q. Who is your employer? A. The U. S. Customs Laboratories.

Q. What do your duties entail? A. Analyzing various textiles that are imported and sent up by the examiners to be analyzed in order to aid them in putting the proper duty on said textiles.

Q. What is your educational background for this position, sir? A. I have a B.S. Degree in textile engineering.

Q. From what school? A. Clemson College, South Carolina.

(1351)

Q. Now I show you Government's Exhibit 27 for identification—rather, Government's Exhibit 27 in evidence, and ask you if you recognize that roll of tape. A. Yes.

Q. Where and when have you seen it before? A. Well, it was brought to the laboratory on May 12 of 1958.

Q. That was by Agent Murphy? A. By Agent Murphy, yes.

Mr. Carlucció: Your Honor, at this point I wish to question the United States Attorney, that he should bring out further qualifications of this gentleman to examine tape and examine for this purpose, his statement on that voir dire or the

qualification was he examines and analyzes for the purpose of customs. I don't know if the analysis of the tape was proper.

The Court: Suppose we wait until we get the question and then proceed.

Mr. Carluccio: Surely.

Q. Incidentally, how many of these analyses do you make a month, on the average, Mr. Logan? A. You mean——

Q. Analyses of textiles. (1352) A. Oh, textiles?

Q. Yes. A. I would say 40 or 50, maybe, a month.

Q. All right, sir, now I show you Government's Exhibit 13 and ask you if you recognize that cloth and the tape thereon. A. Yes, I do.

Q. Where and when have you seen that before? A. At the same time the role of tape was shown to me.

Q. And Agent Murphy also delivered that? A. Yes.

Q. Now, after you received the roll of tape and the rag with the tape thereon, what did you do with them? A. Well, the first thing we did was to take a piece of the tape, I believe—it doesn't make much difference—and we cut a piece from it, and we took a piece from the tape and treated them in the same manner.

The Court: Wait a minute, now. You took a piece of tape from the roll, is that right, and then a piece of tape from the blue cloth in front of you?

A. No, the attached tape, took it from the (1353) attached tape.

The Court: The tape that was attached to the cloth?

The Witness: Yes.

The Court: All right, sir.

Q. Did there come a time when you compared the end of the tape on the roll with the tape on the blue cloth? A. Yes.

Q. When did you do that? A. Well, in the course of looking it over and so on I noticed that it was——

The Court: Wait just a minute. Don't say what you noticed. You did make a comparison?

The Witness: Yes, we did.

The Court: All right.

Mr. Starkey: I ask that this document be marked for identification.

(Government's Exhibit 30 marked for identification.)

Q. I show you Government's Exhibit 30 for identification and ask you if you recognize that picture. A. Yes, I do.

Q. Is that a fair representation of the condition (1354) of the tape on the roll and the tape on the cloth at the time of their delivery to you? A. Yes.

Mr. Carluccio: Objection, your Honor. It is leading.

The Court: Overruled.

Mr. Starkey: I will offer Government's Exhibit 30 for identification in evidence.

Q. Had you made any cuts or any changes in the condition at the time this picture was taken? A. Well, I had taken a cut out of the roll of tape.

Q. The square one in the middle? A. Yes.

Q. Had you touched the end at all? A. It wasn't anywhere near the end, yes.

Q. And that is all you had done? A. Yes, on the roll, and I cut some out of the tape attached to the blue cloth, the blue rag.

Q. Well, where had you cut from the blue rag? Had it been from the edge which fits into——

Mr. Carluccio: Your Honor, I think he should refer to the exhibits. We won't have any record of "this".

(1355)

The Court: Just a minute, please. Show the piece of tape that you didn't cut that is attached to the cloth.

The Witness: Here.

The Court: The one you have in your hand is the part that you didn't cut.

The Witness: Well, this was not too large a piece as I remember, so we cut a piece here.

Q. Was it a straight cut? A. It wasn't cut with a die like this was. It was such a piece that we wanted to get a representative sample so I cut it with a razor blade to get it out of there and then trimmed it off with a pair of scissors.

Mr. Carluccio: For the record, Mr. Starkey, he is referring to a piece of tape stapled to the blue cloth Exhibit 13, and it's the smallest of the two pieces of tape.

The Court: That's right. Let's proceed.

Mr. Starkey: I offer Government's Exhibit 30 for identification in evidence.

The Court: Proceed with the examination.

Q. Now, did you measure the width of the tape on the cloth and on the roll? (1356) A. Yes.

Q. What was the width? A. Three inches.

Q. Of each? A. Yes, the roll and the tape on the cloth.

Q. Did you make any further examinations or any further examinations besides measurement of the tape on each? A. Yes.

Q. What examinations did you make? A. With the piece—well, I will take the roll first, I took a piece there, and we cleaned it up, in other words, extracted with solvent and took the adhesive off that leaving just the cloth, and then the cloth was analyzed.

We counted the number of warp threads per inch, and the filling picks per inch——

Q. And what were the numbers of each? A. And then —well, I will finish by saying that then I took a piece from the tape that was stuck to the cloth and analyzed it also, cleaning up the adhesive, cleaning the adhesive off, and then taking the cotton cloth that was left and treating it the same way, counting the threads in the warp and the filling (1357) threads in the threads in the filling.

Q. And what were they? What were the numbers? A. There were 82 threads per inch in the warp and—do you mind if I refer to my notes?

The Court: Go ahead.

A. 82 warp threads per inch, and 76 filling threads per inch, and then having taken those yarns apart it was then easy to figure the yarn size of these two different yarns.

Q. What were they? A. The warp yarn size was 32 singles. That means a single yarn, not a two-ply. And

the filling yarn size was 44 singles. In both cases the figures were the same. The tape from the roll and the tape from the cloth, that was stuck to the cloth.

And I might add that they both weighed three ounces per square yard.

Q. They weighed the same also? A. The cloth would be three ounces per square yard.

Q. And this was true of both the tape on the roll and the tape on the cloth? A. Yes.

Q. Now, after this examination did you reach (1358) any conclusion as to whether or not the tape on the cloth was off the roll?

Mr. Carluccio: Objection, your Honor. I don't believe that he has been properly qualified as an expert on the matching of tape. Again——

The Court: You may examine him on the voir dire. The Court will accept him unless you can show that he is not qualified. Apparently he is qualified.

By Mr. Carluccio:

Q. Sir, Mr. Logan, during the regular course of your business and work with the government your analysis is mainly for the purpose of determining duty on specific items? A. Yes, I would say so.

Q. And how often do you have to make an examination to determine whether one piece of tape or one piece of tape came off a specific roll? A. Well, we never have that.

Q. You never did that before until this time? A. No.

Q. You mean this is the first time that you ever had to determine whether a piece of specific cloth or tape

came off another piece of specific cloth or tape? (1359) A. No, not adhesive tape but we have had cloths that had heavy sizing and various substances on them that we had to clean off before we could get down to the base of the cloth so it is something similar to that, but I never had tape, I never had adhesive tape before.

Q. With cloth rather than adhesive tape how many times did you so analyze pieces for specific— A. I didn't hear that question.

Q. You said it other times, you had to make analyses other times not for tape but for cloth. How many times? A. Oh, that is quite frequently. The use of resins and the various finishes they put on cloths now is quite——

Q. To match up one piece with another? A. Oh, no, not that.

Q. How many times would you have to match up one piece of cloth with another specific piece of cloth? A. About the only thing that would come into that would be the analysis as I pointed out, about putting the threads per inch, ounces per square yard, and in that way you analyze two samples a lot of times and they (1360) match up in that respect.

Q. But other than this time, today, you never had to match up one specific cloth or tape with another specific cloth or tape and give an opinion as to whether they came from the same bolt or the same roll? A. No, I think not.

Mr. Carluccio: I move that his testimony be stricken because he is not qualified. He never did it before in his life, your Honor.

The Court: Is it your testimony that you never examined a piece of cloth as against another piece

of cloth to see whether or not the two pieces of cloth came from the same bolt or the same supply?

A. No, we wouldn't get a request like that.

The Court: What type thing do you do, sir?

A. Well, the examiner that handles various textiles sends them up to us to be analyzed, and the main thing that they want in a cotton cloth, as this turned out to be the base cloth, is that average yarn size and the same length, and if it's a cloth how it is woven. And we give him the answer, and then he can determine the rate of duty. But I don't think I have ever had to compare, as in this case, a piece of cloth with another piece of cloth for customs purposes.

(1361)

The Court: Well, has it ever been your business to reach conclusions as to whether or not one piece of cloth are the same?

The Witness: That just doesn't come up at all.

The Court: You don't do this?

The Witness: No.

The Court: As I understand it, what you do do, though, is you take a piece of cloth and you examine it to see how many threads in the warp and how many threads in the woof, and then you see what kind of a yarn it is and so on?

The Witness: Yes, you determine the average yarn size and that is the way the duty is put on.

The Court: As I understand your testimony,

you took the adhesive off of the cloth part of the tape.

The Witness: Chemically, yes.

The Court: That was a sample that was taken from can and the sample of tape that was taken from the blue cloth, and you counted——

The Witness: The sample of tape taken from the blue cloth.

Q. Yes, and you counted the threads in each (1362) and you weighed the yarns in each? A. Yes. We had to weigh the separate yarns in order to get the yarn size.

The Court: And my understanding of your testimony is that you found the number of threads both ways were the same in each.

The Witness: That's right.

The Court: And the weight of the yarn is the same?

The Witness: The weight of the cloth was the same.

The Court: Is that your testimony?

The Witness: Yes.

The Court: And that is all it is, I guess.

The Witness: Yes.

The Court: All right.

By Mr. Starkey:

Q. And the width was the same? A. Yes.

The Court: Yes.

Q. Now I show you Government's Exhibit 30 for identification——

Mr. Carluccio: Your Honor, have you ruled on the admissibility of this yet?

(1363)

Mr. Starkey: It is still for identification.

The Court: I haven't ruled on it yet.

Q. And I ask you with specific reference to these edges which I am pointing out, did you tamper with those in any way? A. No, sir.

Mr. Carluccio: What is he pointing to?

A. Do you mean the cuts?

Q. I will ask that question again. With reference to these jagged edges to which I am pointing, did you tamper with those in any way? A. Oh, no.

Mr. Pogoda: If the Court please, I object to the form of the question. I think the witness should be asked not what he did not do, but what he did and ask whether he did that.

The Court: To get to the point, get the end of the tape from the can and get the end of the tape from the blue denim cloth and see if they match. Let's get it over with. We will fool around with it for an hour.

Mr. Starkey: All right, your Honor.

The Court: Don't do that with him. Anybody can see if it matches. You don't have to be a genius (1364) to do that.

Mr. Starkey: I think the picture will facilitate the examination and I would like to have the witness testify, which he has done, that as far as the points with which we are concerned in this photograph, he didn't touch those in getting his samples.

The Witness: Certainly not.

The Court: Haven't you got the two exhibits right there before you?

Mr. Starkey: I do, your Honor.

The Court: Why don't you put them together and see if they match.

Mr. Starkey: All right, your Honor.

The Court: Put it there on the jury rail.

Mr. Pogoda: May I at this time object to Mr. Starkey exhibiting the photograph in the presence of the jury when it is not in evidence.

The Court: I don't think he was exhibiting it, sir, and let the record show that he wasn't exhibiting it.

The Witness: It's kind of dried up now.

Mr. Carluccio: Let the record show that——

Mr. Starkey: Your Honor, I object to the comments of counsel.

(1365)

Mr. Carluccio: Your Honor, he is showing something to the jury and I would like the record to show that there is nothing on the record to show what he is matching up, your Honor. I just wanted to say let the record show that counsel is trying to match up the end of the tape which is in one exhibit in evidence with the larger piece of tape which is on Exhibit 13 and that was what counsel did.

The Court: All right, sir.

Mr. Carluccio: And now let the record show that counsel is making up the end of the tape on the roll with the smallest piece of tape that is on 13.

Motion by Government for Admission of Exhibit 30 in Evidence

The Court: All right, sir. Let's proceed. Are you all finished with the experiments?

Mr. Starkey: Yes, your Honor. I offer Government's Exhibit 30 for identification in evidence.

Mr. Carluccio: Objection. The best evidence is the tape, not the picture.

The Court: I sustain the objection. Are you all finished with the witness?

Mr. Starkey: Yes, your Honor, I am finished. I am finished with this witness, but I would respectfully request to be heard on the question of the photograph, your Honor.

(1366)

The Court: Go ahead.

Mr. Starkey: On that question the witness has testified that this is a fair representation of the condition of these ends of the tape.

Mr. Carluccio: Your Honor, I object. He is showing it to the jury again, your Honor.

The Court: Just a minute, please. He hasn't shown it to the jury.

Mr. Starkey: In this situation, your Honor, since the tape is old and to some extent wrinkled, at this time I think that Government's Exhibit 30 for identification marked in evidence would be of considerable help to the jury in making the determination of the fact question here. I think a proper foundation has been laid for the admission of the photograph and I think that the photograph which I will submit to the Court shows far better than a present——

Mr. Pogoda: I object to any statements of what the photograph shows is not in evidence. I feel

Motion for Mistrial

Denial of Motion for Mistrial and Denial of Motion by Government for Admission of Exhibit 30 in Evidence

Mr. Starkey has transcended the bounds of fair play and I move for a mistrial.

The Court: I deny the motion and I also deny the motion of the government to put this photograph in evidence.

(1367)

Any further cross-examinations?

Mr. Carluccio: One question.

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(1385) • • •

FINBARR J. MURPHY, called as a witness on behalf of the government, being first duly sworn, testified as follows:

Direct examination by Mr. Starkey:

Q. What is your occupation, sir? A. I am a customs agent with the Treasury Department, Bureau of Customs.

Q. How long have you been so employed? A. Approximately four years.

Q. Are you the agent in charge of the investigation of this case? A. I am.

Q. Were you on duty on May 6th of 1958? A. I was.

Q. Did there come a time on that date when you boarded a Grace Line vessel by the name of the Santa Maria? A. Yes, sir, at approximately 2.30 p.m. on May 6, 1958.

Q. Will you tell the Court and jury what you did (1386) and what you observed thereafter?

Mr. Carluccio: Objection, your Honor. If it is to be in narrative form, I don't think it is proper at this time. I think it should be in question-and-answer form.

The Court: I will overrule the objection. It might be quicker this way.

A. On May 6th, at that approximate time, 2.30, I boarded the Santa Maria, and I went to the room of the defendant Massiah. At that particular time I was accompanied by, I believe, two customs searchers. During this time we conducted a search of the defendant Massiah's quarters, bunk and his person. We looked for the false bottom of lockers; we searched under the locker, and there was a false bottom under the locker, took out some screws. I was watching the searchers go through the shelves in his locker, and——

Mr. Carluccio: Did he say there was or there was not a false bottom? I didn't get that.

The Witness: There was.

Mr. Carluccio: There was?

The Witness: Yes. All these lockers have false bottoms. They are built about four inches off the ground.

Q. I show you Government's Exhibit 27 and ask (1387) you if you recognize that roll of tape. A. Yes; I do.

Q. When did you first see that roll of tape? A. I first saw this roll of tape approximately 3 o'clock. I observed it in the locker of the defendant Massiah. During the search I personally opened that myself, as there is a compartment within that tape, and I observed its ragged

edge, and at that particular time it didn't mean anything to me, so I put it back, and I instructed the searchers to continue their work.

Q. What happened thereafter? A. Oh, approximately 3.30 I was informed that a seizure had been made, and it was apparently cocaine.

Mr. Pogoda: I move to strike out what he was informed as to what it was, as being purely hearsay.

The Court: I grant your motion and instruct the jury to disregard the witness' statement as to what he thought it was.

Q. Did there come a time at about 3.30 when you had a conversation with some other customs officers? A. Yes.

Q. What did you do after that conversation? A. After that conversation I was interviewing the defendant Massiah in the headquarters established (1388) aboard the ship.

Q. Who else was present at that time? A. I believe it was Agent McVeigh and myself.

Q. Did there come a time when Agent Cozzi interviewed the defendant in your presence? A. Yes.

Q. When did that take place and where? A. That took place approximately 7.30, I believe.

Q. Will you state what was said at that time by Agent Cozzi and the defendant. A. Agent Cozzi came into the room with this roll of tape here, and he asked the defendant Massiah, did he own the tape, to which defendant Massiah stated that he did and that he had bought it in a South American port.

I, too, asked him, and he told me he had bought it in Callao. He stated that he had hurt his left arm, and it was for that reason that he had the tape.

Q. Now, did there come a time thereafter when you placed the defendant Massiah under arrest? A. Yes. Soon after his stating that he owned the tape, he was placed under arrest.

Mr. Starkey. I ask that this document be marked for identification as Government's Exhibit 32.

(Marked Government's Exhibit 32 for identification.)

(1389)

Q. I show you Government's Exhibit 32 for identification and ask you if you recognize that document. A. Yes. This is a——

The Court: Wait. You do recognize it?
The Witness: Yes, sir.

Q. Where and when have you seen it before, and when did you first see it? A. I came into possession of this document here—it is a National Maritime Union membership book.

Mr. Pogoda: I will object to the witness reading from anything that is not in evidence.
The Court: Don't read from it. Just answer, when did you come into possession of it and how?

A. (Continuing) On May 6, 1958, I took this from the person of the defendant Massiah.
Q. At the time of his arrest? A. That is correct.

Mr. Starkey: I offer Government's Exhibit 32 for identification in evidence.

Mr. Carluccio: For the enclosures that are in there now in the union book when you got it?

The Witness: I believe so.

Mr. Carluccio: Well, do you know?

The Witness: Well, that book has been in the custody of the United States attorney here, and that (1390) is just the way I brought it over, and I would state that it was.

Mr. Carluccio: With all these enclosures?

The Witness: Yes.

Mr. Carluccio: And the photograph?

The Witness: I believe so.

Mr. Carluccio: No objection.

(Government's Exhibit 32 for identification received in evidence.)

By Mr. Starkey:

Q. Agent Murphy, I will ask you to read to the jury from Exhibit 32 the matter contained therein relating to one Renie. A. On page 13 of this document there is a notation in green ink spelled "Renie", and the number is 6085.

Q. I ask you also to read the telephone number on Government's Exhibit 1, the telephone toll slip on Jesse Colson's telephone. A. This document shows "Valparaiso, Chile, 6085, Renie Huasaff."

Q. Agent Murphy, I show you Government's Exhibits 4, 5 and 3 and ask you if you know the identity of the people in those pictures. A. Yes; I do.

Q. Will you tell the Court and jury who they are?

(1391)

Mr. Pogoda: I object. Just a moment. I think a foundation has not been laid so this witness can explain how he knows it.

The Court: I think you better lay a proper foundation.

Mr. Starkey: Your Honor, I have laid as much foundation as I am capable of. If the defense objects to the agent's statement of knowledge of the identification of these individuals, why, then I will have to defer to the Court's ruling in that regard.

By the Court:

Q. Will you state whether or not you have ever seen these people in person? A. No; I have not.

Q. Your basis of saying that you can identify these people is that they were identified by the photographs, is that these photographs were identified by someone for you? A. That's correct.

The Court: I will sustain the objection.

Mr. Starkey: All right, your Honor.

By Mr. Starkey:

Q. I show you Government's Exhibit 26 for identification and 25 for identification and ask you (1392) if you recognize those exhibits for identification? A. I do.

Q. Where and when have you seen them before? A. That exhibit there was left on my desk.

Q. Which exhibit? A. This one right here, this box and the decks on the top of the box.

Q. You say the box, Government's Exhibit 26 for identification, was left on your desk? A. Yes.

Q. Do you know who left it there?

Mr. Pogoda: Objected to, if the Court please, unless the witness was present.

The Court: Did you see it left?

The Witness: No. I instructed them to leave it there. I was in court at the time.

The Court: And then, when you came back to your desk, it was there?

The Witness: That's correct.

The Court: All right. Proceed.

Q. And where was Government's Exhibit 25 for identification at the time? A. That was in the box.

Q. And you took it out of the box? (1393) A. I took it out of the box.

Mr. Starkey: Your Honor, at this time I will offer Government's Exhibit 25 for identification in evidence. In light of the Court's ruling that it was necessary to bring the custodian in, the custodian testified that he released it to Mr. Gow. I think Agent Murphy's testimony completes the chain, and I will now offer the declarations.

Mr. Carluccio: I didn't hear any date as to when it was offered and when it was put on his desk.

The Court: Do you have a date, sir?

The Witness: I think it was Tuesday or Wednesday of last week.

Mr. Carluccio: Do you know the date of Tuesday or Wednesday of the last week?

The Witness: Well, today is the 26th. That would be about the 19th or thereabouts.

Mr. Carluccio: You did not see anyone put it on your desk?

The Witness: No.

Mr. Carluccio: Your Honor, I object to these. There is no declaration of Winston Massiah in the declarations.

The Court: I will overrule the objection. They will be admitted.

(1394)

(Government's Exhibit 25 for identification received in evidence.)

By Mr. Starkey:

Q. Do you know where the declaration of the defendant Winston Massiah, also a crewman on this ship, is at this time? A. No; I don't.

Q. Have you ever had it in your possession? A. I have had it in my possession, yes.

Q. And what did you do with it? A. It came into my possession. I ordered it from the record center at the time Elita Lloyd came to me with a note from Winston Massiah, a "To whom it may concern" note, requesting that I turn over some personal effects and some articles that were supposed to be declared. That is the time I had it in my possession. And Agent Cozzi was with me, and he filled in the required form, the required cashier form, for duty purposes. And Elita Lloyd received defendant Massiah's personal effects and paid duty in the amount of $7.09, I believe. We had to have that dec to make notations as to what he declared.

Q. All right. What happened to it after that? A. I believe I sent it back to the record center again, as I had no more use for it. What happened to it after that I don't know.

(1395)

Q. Do you know whether or not the document is still charged to you as a record? A. Yes. I am informed that it is charged to me as a record.

Q. So that you are on record as charged with the document, but you do not know where it is? A. I do not know where it is. I called for that record, and it was sent up. That is the way they usually charge it.

Q. Did you throw the document away to spoil evidence? A. No.

Q. Did you destroy it? A. I did not.

Q. As far as you know, it has merely been misplaced? A. That is what I believe. It is misplaced some place.

Q. Now, you say you did see the document? A. I definitely did, yes.

Q. Was there any cocaine manifested or declared on that document? A. No; there was not.

Q. Now, I show you Government's Exhibits 13 and 12 in evidence and ask you if you recognize those records. (1396) A. I do.

Q. Now where and when have you seen them before? A. I received those on May 7.

Q. Where? A. Up at the Customs lab, just before the contents of these rags were turned over to the chemist.

Q. And did you keep them in your custody thereafter? A. They have been in my custody continually, except that I brought them over to U.S. Attorney Callandra, I believe, for viewing by the defendant and his counsel, the defendant Massiah.

Q. And otherwise you maintained them in your custody? A. Also on May 15, I believe, I turned them over to Chemist Logan for a comparison of the edge of the tape against the edge of the tape on the roll.

Q. Have you done anything to alter their condition yourself? A. No; I have not.

Q. Do you know when the defendant Thorn was arrested, Agent Murphy? A. No, sir.

Q. Or when he was taken into custody? (1397) A. Defendant Thorn—February 24, I believe, 1961.

Q. Where did you first see him on that date? A. I saw him in this building. I believe it was in your office.

Q. Do you recall whether or not he was questioned at that time? A. He was.

Q. Do you recall who was present at the questioning? A. Besides myself, there was a stenographer, Min Weiner, and yourself, and the defendant Thorn's lawyer.

Q. That was Mr. Archer? A. That's correct.

Q. Do you recall whether or not anyone else was present? A. Yes. I think there was a woman present, a sister-in-law or a sister.

Q. Of the defendant Thorn? A. Yes. Of the defendant Thorn.

Q. Do you see Thorn in the courtroom? A. I do.

Q. Will you point him out, please. (1398) A. He is the defendant furthest on the right.

Q. Do you see the defendant Massiah in the courtroom? A. Massiah is the defendant furthest on the left.

Q. Agent Murphy, did there come a time when you saw the defendant Massiah and the defendant Colson together? A. Yes; there did.

Q. When was that, sir? A. That was on November 19th, 1959.

Q. And where did this meeting occur? A. The meeting occurred on West 146th Street, between Seventh and Eighth avenues at approximately 9.30 p.m. in the evening.

Q. And were they on the street? A. No. This meeting took place in a car operated by Jesse Colson in 1958—a 1958 Chrysler Imperial.

Q. Were you able to overhear what was said? A. Yes; I was.

Q. By what means? A. Prior to this meeting, with the agreement of Jesse Colson, I had placed a Schmidt portable transmitter under the front seat of that vehicle. This device enabled me to pick up the conversation as I am sitting (1399) in another car.

Q. Will you tell the jury what you heard Colson and what you heard Massiah say at this time.

Mr. Carluccio: Your Honor, I seriously object to this evidence and feel that it is illegally and improperly obtained and constitutes a violation of the constitutional rights of my client. It comes under the category of eavesdropping, tape recording, wiretapping. Also I submit that, being that it was placed under the seat, the back seat, as he states, and I believe at the request of the government, with the cooperation of Jesse Colson——

May I ask this question:

Did Jesse Colson cooperate in helping you to place this transmitter behind the seat of the car, Mr. Murphy?

The Witness: Yes; he did.

Mr. Carluccio: —with his cooperation, wherein Jesse Colson was acting as an agent for the government, that this also constitutes entrapment, and

this evidence is illegal and inadmissible, and it should not be admitted at any time in this trial.

Mr. Pogoda: I further object that unless this witness can testify he observed the two of them (1400) and only the two of them in the automobile, the conversation cannot be identifiable unless this witness is prepared to swear that he knows the voices of both people and knew the voices of both people at the time the alleged recording or transmitting or transmission was made.

The Court: Are you prepared to have the witness testify that he recognized the voices?

Mr. Starkey: Yes, your Honor. He previously testified that he talked to Massiah on May 6.

By Mr. Starkey:

Q. Did you recognize his voice on this occasion in November?

Mr. Pogoda: If the Court please, the conversation with Massiah was on May 6th of 1958. There was one conversation. And here we have a conversation on November 19, 1959, a year and a half later. I submit that the one conversation is insufficient as the basis for the recognition of a transmitted telephone voice, and I object to any such response to the question asked by Mr. Starkey.

The Court: Is that the only time you heard the voice of Massiah prior to this recording?

The Witness: No.

(1401)

The Court: This really was not a recording, was it?

Finbarr J. Murphy—for Government—By the Court

The Witness: No. It was transmitted through the air.

The Court: It was a transmission?

The Witness: Yes.

The Court: Received simultaneously by you by radio, I guess?

The Witness: I have earphones to pick it up.

A. (Continuing) Subsequent to the arrest of Massiah, I believe I spoke to him in the Federal House of Detention.

Q. Have you spoken to Massiah since then? A. Yes. I have spoken to Massiah in your office, in November of 1960. I spoke to Massiah—I had a conversation with him in the office of Callandra, I believe, when he came up to look at these particular exhibits here.

Q. Do you have any doubt that the voice you heard over the Schmidt device was Massiah's voice? A. No doubt at all, my reasons being that I had been speaking with Jesse Colson.

The Court: Wait just a minute, please.

The question before the Court now is whether or not you recognized this voice, which was coming over, as (1402) the voice of Massiah. We are not interested in what anybody told you about it. We are interested in finding out whether or not you recognized Massiah's voice.

The Witness: Yes. I recognized it.

Q. Could you also view the conversation as it took place? A. I could.

The Court: You were looking at these people at the same time?

The Witness: Oh, yes, sure.

The Court: You were looking——

The Witness: I had them under observation visually and electronically.

The Court: I see. And you could see that there were only two people in the car?

The Witness: There were only two people: the driver and the defendant Massiah.

The Court: And you were familiar with Colson's voice?

The Witness: Oh, yes, quite familiar.

The Court: You had been talking to him daily for weeks, I assume?

The Witness: Months would be more like it.

The Court: Months?

The Witness: Yes.

(1403)

The Court: And did you recognize Massiah in the car physically by seeing him?

The Witness: I recognized him just opening the door, and when he got inside I recognized him also.

The Court: In other words, you recognized him as the defendant, and as the other person in the conversation with Colson?

The Witness: I did, sir.

The Court: What was the date of this conversation?

The Witness: November 19, 1959.

The Court: And this was after Colson's arrest?

The Witness: Yes. Colson was arrested in July, 1959.

Mr. Carluccio: Your Honor, if the Court please, I also wish to make known to the Court one other

reason for my objection, and that is the best evidence rule. I feel that if this is a conversation between Colson and Massiah, and Colson was present at the conversation, that Colson should be brought in to testify as to what was said and how it was said.

Mr. Starkey: Your Honor, I object to——

The Court: Wait a minute.

Mr. Carluccio: The reason being twofold: (1404) Colson is available for testimony——

Mr. Starkey: I cannot let this go any further, your Honor. This is gross misrepresentation on the part of the attorney.

The Court: The jury will disregard what counsel on either side will say here as to the availability of Colson. The jury is not informed as to the availability of Colson.

Mr. Carluccio: When we find that he is alive—not that has has passed away—however, that Colson can testify as to what was said, and I make also the analogy with the tape that we had introduced with the rag: it is not a photograph of the tape, so likewise, the best evidence in this instance is the conversation as Colson heard it from Massiah, in addition to which, as your Honor well knows, the reason for this conversation, most probably, was to pump the defendant for admissions, and if they are admissions against my client's interest, it has always been a rule of law that admissions may be explained, the full circumstances around the admissions and how the statements were made.

In this respect I can't cross-examine an inanimate tape recording, because all Mr. Murphy will be

stating in his examination by Mr. Starkey will be the (1405) inanimate words of what he heard on this machine, this tape recording.

If Colson is here to testify, we can find out not only what was said, your Honor, but how it was said, the demeanor of the parties, where it was said in a jocular fashion, whether it was said in a serious fashion, and the like. And I feel that if counsel wishes to bring out admissions, they should be brought by the best evidence, Mr. Colson, who was there, not a hearer of an inanimate recording, so that our right of cross-examination is not curtailed.

The Court: That is overruled. The Court is going to admit the language as far as possible as to what Massiah said, not what Colson said. In other words, I don't want you to give what Colson said at all. I just want you to give what you heard, as the words came from Massiah's mouth.

The jury is also instructed that this evidence is binding only on the defendant Massiah. This evidence is not to be construed in any way with reference to the guilt or innocence of the other defendants on trial. This is evidence only as to the defendant Massiah.

All right. You may proceed.

Mr. Starkey: In regard to the application (1406) of the defense just now, I would merely like to state for the record that I have submitted to the Court and defense counsel the government's memorandum of law citing On Lee, in which the Supreme Court ruled on this precise question.

The Court: All right.

By Mr. Starkey:

Q. What was said by Massiah during the course of this conversation? A. Massiah stated——

The Court: Wait just a minute, please.

Delete from what Massiah said anything about anybody else participating except Massiah. Do you follow me?

The Witness: Yes.

The Court: In other words, don't give us anything about anybody but Massiah, since this is only binding on Massiah. Omit from your testimony anything with respect to any other person, including the defendants in this case.

Mr. Pogoda: If the Court please, if there is a typewritten transcript of the conversation, I think the defense should have the opportunity to examine it.

The Court: Yes.

(1407)

Q. Now, will you proceed, Agent Murphy. A. The defendant Massiah stated that during this time he had made a million mistakes and that instead of fighting each other, they should be fighting hard to win this case. He stated that while in Valparaiso, Chile, at the home of Rene Huasaff, he sat down and wrote a letter to New York stating the exact amount of cocaine he was bringing in, the exact amount that Rene Huasaff expected of him. He said this letter was written in the presence of Rene and his wife. He stated that he had the cocaine in his room in a suitcase for approximately 22 days, and that two

days out of New York he noticed the cocaine was evaporating. He got the roll of tape and attempted to make it airtight so that there would be no further evaporation. And he stated that it was this tape that got him in all this trouble.

Q. Do you recall any further conversation? A. Yes. He stated that on arrival he met a longshoreman and that he motioned him through the passageway to show him where the cocaine was sitting, and that while walking through the passage way he saw two big men following him. He states that, "Jesus Christ, they must have been bulls"—the exact words. To that he said, "I told the longshoreman to come back later, it was too hot."

(1408)

He stated that he intended to give the longshoremen all the cocaine at that time.

Q. Do you recall anything about the informer? A. He stated that the informer—it's a bit difficult to get this across. He stated that he knew who the informer was in this case, and that he thought that besides the informer there were other people involved. He stated that, "If they knew so much about my meeting Rene in his truck in Valparaiso," that the Feds must have been watching him a lot longer than what they had anticipated.

Q. Can you recall the exact words about the informer? Were any names mentioned? A. Yes. The informer was named as Frank Torres.

Q. Was anything else said? What was said, Agent Murphy? Were any other possibilities discussed? A. Yes. The defendant Massiah stated that he was not stealing from the packages as they were coming in in the past, and he could not see how anybody could accuse him of

stealing from any of the packages, because it was not in his makeup to steal, and if he did, he would be afraid of revenge on the part of his fellow-conspirators.

Mr. Carluccio: Objection, your Honor, (1409) especially as to the last part.

Mr. Starkey: The government consents to strike out "conspirators".

Mr. Carluccio: "fellow-conspirators"—that whole phrase.

The Court: The motion of counsel to strike is granted, and the jury is instructed to disregard that part of the testimony.

Q. Was May, the chemist, mentioned? A. Yes. The defendant Massiah stated that besides Frank Torres, he had just remembered that the biggest informer of all—the exact words—the biggest stool pigeon of all was a woman he identified as May, a federal stool pigeon, and it could have been May, because he had some dealings with May. And besides the information they probably got together, the Torres information, "and that's how I was fingered."

Q. And you said a chemist was mentioned? A. Yes. Massiah stated that at one time, while in Valparaiso, he remembered Rene introducing him to a chemist by the name—he didn't mention his name—he said a chemist with a gimpy leg, and he thought perhaps it was also the chemist who could have put the finger on him besides Torres.

(1410)

Q. Did he say why he thought this? A. Yes. He stated that during the transaction this man stood right there, and he was present while the transaction was going on in the

past. And he had personal knowledge of just what was transpiring.

Q. Was anything said about a misapprehension by Colson? A. Yes. Massiah stated that Rene questioned him as to who was going to get the load.

Massiah stated that Colson was to get the load, that he was going to handle all the distribution of it.

Then Colson—Massiah stated that, "I told Rene it was all for you and that I have no intention of stealing anything."

Q. Did there come a time when you saw Colson and the defendant Anfield together? A. Yes; there did.

Q. And when was that? A. This was on December 5, 1959, approximately 9.30, 9.45, in the southeast corner of Lenox Avenue at 118th Street.

Q. Did you see whether or not they conversed? A. Yes.

Q. Where did the conversation take place? (1411) A. The conversation took place in a 1958 Chrysler Imperial driven by Jesse Colson. The defendant entered into the car and entered into a conversation with Colson.

Q. And where did this take place? A. The southeast corner of Lenox and 118th Street, on Lenox Avenue.

Q. Were you able to overhear this conversation? A. Yes; I did.

Q. Will you state what was said by the defendant Anfield?

Mr. Pogoda: If the Court please, this witness has not yet identified the voice of the defendant Anfield.

Mr. Starkey: I am sorry, your Honor. I ask the Court's leave to proceed.

The Court: Yes.

Finbarr J. Murphy—for Government—Direct

Q. Did there come a time thereafter when you had a conversation directly with Anfield?

Mr. Pogoda: I will not object to any conversations after. We are now identifying the voice at the time of this conversation.

The Court: Did you see the defendant Anfield enter Colson's car?

The Witness: I did.

(1412)

The Court: Did you know him at that time?

The Witness: I had a picture of him at that time.

The Court: I see. And you recognized him from his picture as he entered the car?

The Witness: I did.

The Court: And you knew he was Anfield when he entered the car?

The Witness: I did.

The Court: You had not had any previous occasion to talk with the defendant?

The Witness: Myself?

The Court: Yes.

The Witness: No. Not at that time.

The Court: Did you see anyone else in the car?

The Witness: Yes. Jesse Colson was in the car.

The Court: There was no one in the car other than these two?

The Witness: Just the two occupants, Colson, and the defendant Anfield.

The Court: And at this time were you familiar with Colson's voice?

The Witness: I was.

(1413)

The Court: And your statement as to the voice of Anfield comes from what? In other words, how did you distinguish Colson's voice from Anfield's voice?

The Witness: Well, there was two people in the car. I knew Colson's voice. Subsequent to the recording, I spoke with the defendant Anfield in my office, prior to his arrest, and I had conversations the day I arrested him, with him.

The Court: Are you saying that on the day in question you were familiar with Colson's voice, and since Anfield was the only other person in the car, when you were not hearing Colson's voice, then the other voice had to be Anfield's? Is that about how you get the deduction?

The Witness: That is how I arrived at that conclusion.

By Mr. Starkey:

Q. Agent Murphy, you did talk with Anfield after this conversation in the car also? A. Yes. After the conversation, yes.

Q. And at that time did you recognize his voice as the one in the car? A. Definitely, yes.

(1414)

Mr. Starkey: I think it can be done both ways, your Honor.

Mr. Pogoda: I think I should be permitted an opportunity to question this witness before he is asked any questions about the conversation.

The Court: All right, sir. You may.

Mr. Starkey: Your Honor, if I may be heard, I will object to the interruption here. I think we have laid a proper foundation, and I would like the Court's leave to proceed with my examination. I think that anything counsel has to say now is more appropriately done on cross than on voir dire.

The Court: The question was the admissibility here, and I will let counsel proceed.

By Mr. Pogoda:

Q. Now, Agent Murphy, was the Colson car parked on Lenox Avenue, or was it parked on 118th Street?

Mr. Starkey: Your Honor, I object right here and now. I submit that this very first question indicates that his questions are more appropriately directed to cross rather than voir dire.

Mr. Pogoda: I am entitled to see if he was in a position to see who was in the car, and that is what the question is intended to lead to.

Mr. Starkey: I submit that the foundation has (1415) been laid and that this examination is more properly done on cross.

The Court: That is overruled. Proceed. Let us not have an extended examination about this.

A. Do you wish to know where the car was parked?

Q. The Colson car. A. On the southeast corner on Lenox at the corner of 118th Street.

Q. Where were you at the time? A. I was in a car parked on the northeast corner, double-parked right at the intersection.

Q. Your car was up ahead of the Colson car, isn't that correct? A. That's correct.

Q. So you didn't see what was happening in front of you, did you, Agent Murphy? A. Did I see what was happening in front of me?

Q. You were facing north, weren't you? A. I was looking back.

Q. Was your car on the corner? A. No. It was double-parked against the car on the corner.

Q. And was the Colson car double-parked also? A. No. Colson had a spot right on the corner.

(1416)

Q. Did you make a note anywhere of the time it happened? A. I made a note on the transcript there—I believe it was the following morning I transcribed that tape—as to just where the meet was made.

Q. Now, Agent Murphy, when for the first time did you speak to the defendant Anfield? A. It was between December 15 and the date of his arrest, December 16th, I believe. I spoke to him in the union hall. I spoke to him in my office.

Q. So it was a matter of ten days to two weeks after you listened to this transmission of voices that you first spoke to him? A. I believe it was more. It was three or four days after the conversation was overheard.

Q. This conversation you said was on December 5, is that right? A. That's correct.

Q. And didn't you say that it was December 16th that you first spoke to him? A. No, no. I spoke to the defendant Anfield in the union hall prior to his arrest and after the tape was made and in my office. I would say approximately three or four days after I made this——

(1417)

Q. How long was this first conversation with him? A. The first conversation?

Q. Yes. A. Approximately a half hour.

Mr. Starkey: Your Honor, I will again object on the same grounds previously made. I think this is becoming extended.

The Court: I think he is coming to it now.

By Mr. Pogoda:

Q. Between the time you heard this record or this transmission of voices and the first time you spoke to him, did you speak to anyone else in connection with this case? Any defendants?

Mr. Starkey: At this time I will object and submit that we are getting collateral.

The Court: This is probably his final point, so answer the question.

Q. Did you speak to any of the defendants, other defendants in this case, between the time of this transmission of voices and the conversation in the union hall? A. Yes. I believe I spoke to——

Q. How many? A. Just one.

(1418)

Q. Which one? A. The defendant is not here right now.

Q. The defendant Colson? A. That's right.

Mr. Pogoda: If the Court please, I respectfully press my objection. An improper foundation has

been laid for a conversation between the defendant Anfield and Colson, to which the witness is about to testify.

The Court: That is overruled. The jury is instructed again that this testimony which will be given is binding only on the defendant Anfield. It is not binding on anyone else other than Anfield, since it is his own statement.

Further than that, the witness is instructed to give the testimony without reference to any of the other defendants on trial. I am not assuming that there was any reference in these conversations to any other defendants, but in the event that there is, you should eliminate that from your statement.

The Witness: Yes, your Honor.

By Mr. Starkey:

Q. Will you state what was said by Anfield on this occasion. A. He stated that he had made one run down to (1419) Valparaiso, Chile. It was on the Santa Louisa. And at the time he brought it into the country here, he had it hidden in his mattress. He stated that he was not worried about being arrested, because since the Massiah arrest, approximately two years had transpired, and, "if I were to be arrested I would have been arrested long ago."

He stated that he had received a fair deal from Jesse Colson, that after every sale was made the money was split down the middle on the table, and if there was any cocaine left it would be split, too.

Q. Was anything said about when this run took place? A. This, yes. This run that the defendant Anfield made was after the stickup of the defendant Massiah. He stated that, "After the stickup I made the run. Then you made

two or three more, Jesse, and then we got defendant Massiah back in, and it was at this time that all the trouble started, when you brought that boy Paul King into this deal." And his story about coming back with eight ounces being thrown overboard.

Colson stated, well, that was just——

The Court: Just a minute. Don't give us what Colson stated, just what Anfield said.

The Witness: I am sorry.

(1420)

A. (Continuing) Anfield stated that, "You talk about all the larceny between us. What about that eight ounces? And we had invested $6,000."

He stated that during this participation with Colson he had kept records. He stated that the biggest narcotics man and the smallest narcotics men keep records, and if in the event they are investigated by the police, it doesn't necessarily have to mean that the records on hand mean anything about a narcotics transaction. It could be loans. There is no way they can pinpoint this keeping records.

He stated that, "When you were down sailing, everything was running smoothly. I was doing cash business. If you wanted money, six hundred dollars, a thousand dollars, it was always there. I was out in the streets, and everything was running smoothly."

Q. Was anything said about when the trouble really started? A. Yes. As I stated before, the trouble really started when this fellow Paul King came into the picture. Jesse stated——

The Court: Just a minute, please. Just give us what Anfield stated, please.

A. (Continuing) Well, Anfield stated the trouble really started when this fellow Paul King came into the (1421) picture.

Q. Was anything said about Massiah?

The Court: Wait just a minute, please. The witness has been instructed not to mention and to delete from any testimony any reference to any of the defendants in this case on trial. I am not assuming that there is any reference, but the ruling of the Court is that the witness is not to indicate in any way any such connection, if there is one.

Mr. Starkey: I am sorry, your Honor. I did not understand that that was the Court's ruling.

The Court: All right.

Q. Was there anything said about theft? A. Yes. The defendant Anfield stated that he was aware that someone was stealing from the packages, but he said, "What the hell, Jesse, you're getting yours, and I'm getting mine, and the theft didn't amount to that much anyhow."

Q. Did there come a time thereafter when you had a conversation directly with Anfield? A. Yes. On the date of the arrest in this building, just prior to his arraignment, I was speaking with another agent in the corridor, and the defendant Anfield called me over and said——

(1422)

The Court: Just a minute, please.

Again, the jury is instructed that what the defendant Anfield is alleged to have told the agent at this time is not evidence against anyone except the defendant Anfield, and it should not in any way be

understood to be evidence against any other defendant. It is applicable only to Anfield.

In giving this, delete from any statement that Anfield made any reference to any other defendant on trial, if there was such—and I don't want the jury to assume that there was such. We want to be very careful about this.

A. This was just a conversation I had with the defendant Anfield. No other defendants were mentioned.

As I stated before, he told me he wanted a drink of water, and, as I approached him, he started to walk outside, and he said, "Wait a minute, Murphy."

I said, "What is it?"

He says, "Well, I would like to come clean."

So I said, "Well, tell me."

He said, "Well, I did bring in cocaine on the Santa Luisa."

I asked him where he kept it. He said he kept it in his locker. I asked him, "Well, how much was it?"

(1423)

He said, "Approximately eight ounces."

I stated, "Well, are you willing to make a statement to that effect after the arraignment?"

He said, "Yes. I want to cooperate fully."

And that was about the sum and the substance of the conversation.

Q. Did there come a time after that when you again saw Massiah? A. I don't understand that question.

Q. Winston Massiah. A. Yes.

Q. Did you again see him? A. After what conversation?

Q. After December of '59, the conversation with Anfield that you just described. Did you see him in my office? A. Yes. During the month of November, 1960, the defendant Massiah, accompanied by his counsel, came into the office of United States Attorney Starkey, at which time a statement was taken—not a statement—Mr. Starkey took notes as to this matter,

Mr. Carluccio: At this point I wish to object on the ground that the conversation had at that time was strictly agreed to be without prejudice, and any further testimony along this line should be therefore curtailed.

(1424)

Mr. Starkey: Your Honor, I am not sure I understand counsel's objection. May we approach the bench?

The Court: No. I overrule the objection, anyway.

Mr. Starkey: Your Honor, may I request a brief recess at this time? I would like to talk with Mr. Carluccio about the objection.

The Court: All right. We will take a five-minute recess.

(Short recess.)

(The following occurred in the absence of the jury:)

Mr. Starkey: Your Honor, I am not going to proceed with the evidence I was just about to adduce, because Mr. Carluccio tells me that I told him at that time that I would not use the evidence until the defendant Massiah told me he had definitely made up his mind to cooperate and that

there would be no question of its use until there was a definite understanding.

However, at this time, your Honor, I would like to make application to the Court to permit Agent Murphy to testify about references to other defendants in the conversations concerning which he has already testified, (1425) and I make the application for this reason: that concededly these admissions made by Anfield and Massiah in conversations with Colson are only admissible insofar as the question of their own guilt is concerned. However, the charge here as to each of them is conspiracy, specifically designating other individuals as set forth in the indictment, and admissions on their part that show an acquaintance and actual cooperation with specifically-named other defendants named in the conspiracy count of the indictment are very, very probative insofar as proving their guilt is concerned, showing their conspiracy with others and showing conspiracy with other persons, with whom they are specifically charged with conspiring.

Now, I agree that there is some danger of prejudice overlapping onto defendants from these admissions, but I refer the Court to United States v. della Paoli, where this precise issue again was considered by the Supreme Court, where a confession was admitted in evidence and where, as here, it was impossible for the evidence to be delivered in a coherent, intelligible, understandable form with excision of references to accomplices.

The Supreme Court did uphold the admission of (1426) such a confession, in that case a written

confession, indicating accomplices in the della Paoli case, and I submit that this situation is very, very comparable to that, and I would make application at this time for the Court to permit Agent Murphy to so testify.

The Court: It is the Court's view that the testimony does have probative value, but you must weigh the probative value of the testimony against prejudice which would result as to the other defendants.

The fact that it has some probative value as to one defendant does not necessarily mean it should be admitted where the admission might be very prejudicial to others involved in the trial of the case. The government sought to bring these cases on trial together, these defendants on trial together, and consequently the government risked the possibility of some of their evidence which would have been admissible if the defendant had been on trial alone not being admitted because there were other defendants against whom the admission of such evidence would have been prejudicial.

It is my view that the witness has been able to testify coherently with reference to the statements made in connection with these transmissions from the automobile, Colson's automobile, with the excision of any reference to any other defendants, and I think it would be dangerous, (1427) perhaps, to allow this evidence, which is admittedly not available to the government, as against the defendants who have not made the statements—it would be prejudicial for that evidence to come into the record, and I think this Court should make

certain that it does not come in under these circumstances.

Mr. Starkey: All right, your Honor. I will naturally defer and abide by the Court's ruling. I merely wanted to make the application so that the government's position is absolutely clear.

The Court: All right. Is that all now?

Mr. Starkey: Yes, sir.

The Court: All right. Call in the jury.

(The following occurred in the presence of the jury:)

Direct examination continued by Mr. Starkey:

Q. Now, Agent Murphy, do you know Leon Ellis? A. Leon Ellis?

Q. Schoolboy. A. Yes, sir.

Q. Was it you who placed him under arrest on March 26, 1961? In April? A. Actually, he was placed under arrest by a Customs enforcement officer. I was nearby.

(1428)

Q. And were you in the courtroom when Schoolboy testified? A. I was.

Q. Do you recall questions being addressed to him as to whether or not he was told he was indicted in this case or not? A. I remember.

Q. Did you ever have such a conversation with him?

Mr. Somers: I will object to that. I think that Mr. Starkey is apparently going to impeach the testimony of his prior witness.

Mr. Starkey: Not at all, your Honor. Schoolboy testified that he could not remember.

Mr. Somers: Schoolboy here testified at great length to two days——

The Court: That is overruled.

Answer the question.

Q. Did you ever have a conversation with him as to whether or not he was named in this indictment? A. I did.

Q. When? A. Coming down the West Side Highway, after he was placed under arrest.

Q. And that was the end of April? (1429) A. Yes.

Q. What did you say? A. I told him that he wasn't named in the indictment.

Mr. Somers: He was not named?

The Witness: Not a defendant in the indictment.

Mr. Somers: I am sorry.

A. (Continuing) He was not a defendant in this case.

Q. Do you know a man by the name of Leon Aiken? A. I do.

Q. Or Leonard Aiken, I should say. A. I do.

Q. Was it you who placed him under arrest? A. Yes. I executed a warrant on December 13th.

Q. On what? A. Not December. May 13, 1961.

Mr. Starkey: I ask that this document be marked as a government's exhibit for identification.

(Marked Government's Exhibit 33 for identification.)

Q. I show you Government's Exhibit 33 for identification and ask you if that is the warrant which you executed in taking Aiken into custody? (1430) A. Yes; it is.

Mr. Starkey: I offer in evidence Government's Exhibit 33 for identification.

Q. Did there come a time thereafter when you saw the defendant Aiken and myself together? A. Yes, sir.

Q. Where was that? A. It was in your office in this building.

Q. Did you hear any conversation at that time? A. Yes; I did.

Q. Did you hear any conversation as to his identity, or concerning his identity? A. Yes.

Q. What did I say and what did he say? A. First you asked him his name. He gave you Leonard Royall Aiken. You asked him, "Are you known by any other names?" He said, "Yes. I am known as Leon."

Q. Was there any conversation that you recall about Schoolboy? A. Yes. You asked the defendant Aiken if he knew a Schoolboy, to which defendant Aiken stated that he knew a fellow by the name of Schoolboy, he knows him two or three years.

(1431)

(Government's Exhibit 33 for identification received in evidence.)

Q. Were you present at the arraignment of the defendant Aiken? A. Yes.

Q. What happened thereafter? A. After his arraignment?

Q. Yes. A. I brought defendant Aiken down to the U.S. marshal's office, approximately 1.30 or 2 o'clock. There were no marshals available to take him to West Street for safekeeping, so I brought him over, and I pulled up in front of the Federal House of Detention, and

I turned to tell the defendant Aiken to get out, I was going to place him in the house, at which time I noticed the defendant Aiken was sweating profusely and had a nervous twitch on the side of his face.

Mr. Somers: I object to the characterization "nervous twitch", your Honor.

The Court: Suppose you describe what was said, leaving out the word "nervous." Describe how he looked.

A. (Continuing) The left side of his face was moving back and forth and jumping. I told him to get out, and defendant Aiken said, "Wait a minute."

(1432)

And I said, "Why?"
He says, "If you ever get any stuff"——

Mr. Somers: Your Honor, I object to that. This is a conversation in no way relevant to the eighth count of the indictment, which charges this defendant with conspiracy, and unless Mr. Starkey is going to limit this to such conversation or such declaration by the defendant Aiken as may be construed in furtherance of the conspiracy, I submit it is highly improper, highly prejudicial. The conspiracy was terminated back in 1958 in the fall. This is a conversation held in March of 1961.

Mr. Starkey: May.

Mr. Somers: May, 1961, long after the termination of the conspiracy. If this defendant were charged individually with a substantive count, I might recognize the value of that and the admissi-

bility of it, but I submit, your Honor, to allow this conversation into the record is highly prejudicial, in no way in furtherance of the conspiracy and absolutely inadmissible.

Mr. Starkey: The government, of course,——

The Court: I think the government has filed a memorandum covering this particular evidence, and the Court has had an opportunity to study the memorandum (1433) and also the authorities, and it is the Court's view that the evidence is admissible only as to the defendant Aiken, and the jury is instructed that what the witness will testify to now is admissible only as to the defendant Aiken and not as to any other defendants on trial, and is in no way to give rise to any inference whatever as to any other defendants on trial, other, of course, than the defendant Aiken.

Mr. Somers: Your Honor, do you feel that this is under the eighth count of the indictment in furtherance of the conspiracy? On what ground, may I respectfully ask, has your Honor decided that it is admissible?

The Court: Well, sir, I don't want to give it to you in front of the jury, but I am in accord with the cases which the government cited in its memorandum and the principles which are outlined in those cases, not that it is connected with the conspiracy at all.

Mr. Somers: I see. It is not on that ground?

The Court: No. Nor does it refer to the conspiracy, nor does it relate to the conspiracy, but it is on the basis of the cases in the memorandum.

Mr. Somers: Thank you, Judge.

Mr. Carluccio: With all due deference to your Honor's ruling, for the record, I respectfully (1434) object on the ground that even though your Honor has cautiously instructed the jury, I feel that the strong and highly prejudicial sounds of those words will drown out all weaker sounds, and the probative value that might be adduced with reference to the point that Mr. Starkey makes will not blot out the words in the jury's minds, and the jury will not be able to make this very fine distinction, and my client will be therefore prejudiced.

The Court: Let the objection be recorded, and it is overruled.

Proceed.

By Mr. Starkey:

Q. Will you proceed, Agent Murphy, with the conversation you were describing? A. Yes. The defendant Aiken stated to me that, "If you get any stuff you want to get rid of, call me."

And I said, "What?"

He said, "If you get any stuff you want to get rid of, call me. You can trust me."

I said to him, "I can trust you? Do you know who I am?"

He said, "Yes."

I said, "Well, as of last night I never even met you." (1435)

He says, "Don't worry. You can trust me."

I said, "I don't work like that. If I am going to work with you, I've got to know who you are doing business with."

He said, "What do you mean?"

I said, "Well, I have a lot to lose here."

So I told him, "I've got to have references. Give me some people that I can check up." I said, "I got to have references of people that have done business with you before, before I go into anything with you."

And this conversation terminated, and I took him into the Federal House.

Q. Now, Agent Murphy, are you familiar with the vernacular and slang used in the New York area insofar as a reference to narcotics is concerned? A. I am.

Q. Do you know any of the words which are used among narcotic traffickers to designate narcotics? A. I do.

Q. Will you tell the Court and jury what such words are? A. Cocaine is "white stuff." They call it "C". "H" is "horse", heroin. "Reefer" is marihuana, "pot", "M".

Mr. Starkey: No further questions.

(1436)

The Court: Take the witness, please.

Cross examination by Mr. Carluccio:

Q. Mr. Murphy, with reference to the two cloths which were 12 and 13——

Mr. Starkey: I am sorry, your Honor. I did overlook one item. With the Court's leave, I will continue.

The Court: Yes.

Mr. Carluccio: All right.

Finbarr J. Murphy—for Government—Direct

Direct examination continued by Mr. Starkey:

Q. Insofar as the conversations between Colson and Anfield and Colson and Massiah in the automobiles were concerned, do you know whether or not there were any other devices present besides the microphone over which you heard the conversation? A. Yes; there was.

Q. And what was it or what were they? A. It was a Minifon tape recorder that I had placed in the glove compartment of Jesse Colson's car, and we taped the conversation.

Mr. Starkey: May these tapes be marked as Government's Exhibits, please.

(Marked Government's Exhibit 34 for identification.)

(Marked Government's Exhibit 35 for identi-
(1437) fication.)

Q. Did you receive those recordings after the conversation in each instance? A. Did I receive them?

Q. Yes. A. Yes.

Q. What did you do with them thereafter? A. After the conversation I had them retaped onto this tape here.

Q. I show you Government's Exhibits 34 and 35 for identification and ask if those are the tapes in question. A. Yes.

Q. You played those tapes back and listened to them? A. Oh, yes.

Q. Can you tell the Court and jury how distinct or how clear the conversations are? A. Well, first of all, you've got to know the voices of the people concerned,

because they are audible to me but maybe to a stranger it might take two or three playings before you actually pick up the actual content of them. But they are not the best.

Q. But they are audible and they can be made out? A. Oh, yes.

Mr. Starkey: I offer in evidence Government's (1438) Exhibits 34 and 35 for identification.

Mr. Carluccio: I object, your Honor. There is a great deal of objectionable material in the tapes by virtue of the fact that you directed Mr. Murphy's testimony only to evidence that was concerned with the particular defendant, and in addition there is not only that, as I can see from two of the records there are privileged matters; there are many other matters in there.

The Court: I sustain the objection. Proceed. It is your witness now. You may cross-examine.

• • • •

(1450) • • •

Cross-examination by Mr. Pogoda:

Q. Now, Agent Murphy, when were you originally assigned to this case? A. In April, the end of April.

Q. Did you have occasion to speak to Frank Torres? A. Yes.

Q. And the information you received from him was that there was a shipment of cocaine coming in on the Santa Maria; isn't that so? A. In part, yes.

Q. And based upon that information, you alerted other men in your division? A. Well, no. Other men in my division?

Q. Yes. A. Well, yes. People who would work with me on this case.

Q. Ordinarily you do not go down to search a ship, do you? A. Yes. We are there on a particular case when the information is good and you are assigned a definite investigation, so you go.

Q. This was not the ordinary, routine search by the Customs enforcement officers, was it? (1451) A. No.

Q. This was a more thorough search than usually is made; is not that true? A. Not a more thorough search. We just had information as to where to look, the possible areas.

Q. You boarded the ship when it docked, together with the other officers, am I correct? A. That's correct.

* * * *

(1459) * * *

Q. * * * Who was the second defendant arrested in this case? A. Jesse Colson.

Q. When was he arrested? A. In July of '59, I believe.

(1460)

Q. From whom did you get Jesse Colson's name?

Mr. Starkey: I will object to that, your Honor. This gratuitous inquiry into law enforcement methods I think is improper, and I object to it.

The Court: Did you get this from a confidential informant?

The Witness: No. The man's name has been mentioned here.

The Court: I will overrule the objection.

Q. Frank Torres? A. Yes.

Q. Now, when did you get Colson's name from Frank

Torres? A. Well, maybe it was before the arrival of the Maria on May 5—May 6, rather.

Q. Did you get any other names besides Colson's name from Frank Torres before the arrival of this shipment? A. People involved? No.

Q. No one else but Colson and Massiah? A. Actually of people involved, no. That's correct.

Q. When for the first time did you have a conversation with Jesse Colson? A. The first time I spoke to Colson was the date (1461) of his arrest.

Q. Or that you had known—and that was in July of 1959? A. That's correct.

Q. Although you had known of Colson's name back in April of 1958 and had made an arrest in connection with the information given you by Frank Torres, you first apprehended Jesse Colson in July of 1959?

Mr. Starkey: I will object to summation, your Honor.

The Court: The witness has already testified to this. I sustain the objection.

Q. Did you have Jesse Colson under observation during that period of time? A. Yes; we did.

Q. Did you arrange to interview Jesse Colson after his arrest? A. Yes.

Q. Where? A. I spoke to Colson in the Federal House of Detention.

Q. Was a recording made of that conversation? A. No.

Q. Was there a reporter present or a stenographer present during that period of questioning? (1462) A. No.

Q. Was Colson there held under bail?

Finbarr J. Murphy—for Government—Cross

Mr. Starkey: I will object, your Honor.

The Court: What are you going into Colson for?

Mr. Pogoda: I want to show some sort of favored treatment because of the conversations with this——

Mr. Starkey: Colson was neither a witness nor a defendant on the trial of this case, your Honor.

The Court: You want to show some favored treatment to Colson?

Mr. Pogoda: That is right.

The Court: I will overrule the objection. Proceed.

Q. What was Colson's bail at the time of his arraignment, if he was arraigned? A. I think it was $10,000 and reduced to $7,500.

Q. Was his bail originally $150,000? A. Gee, it may have been.

Q. Then it was reduced to $10,000 and then further reduced to $7,500? A. It could have been reduced right to $7,500. I am not too sure.

Q. How many conversations in all did you have with Jesse Colson?

(1463)

Mr. Starkey: Objection.

Q. What is the purpose of this, Mr. Pogoda?

Mr. Pogoda: Because throughout this entire trial, if the Court please, each and every witness who has taken the stand has related conversations they have had with Jesse Colson, and Jesse Colson's

conversations related to these defendants, and it would appear as if Jesse Colson were a witness in this case without taking the witness stand.

The Court: It would appear what, sir?

Mr. Pogoda: That Jesse Colson was a witness in this trial, although he never took the stand. Your Honor permitted conversations Jesse Colson had with Schoolboy and with Paul King and the like.

Mr. Starkey: Your Honor, may I be heard?

The Court: All right, sir.

Mr. Starkey: I think the record shows, your Honor, that any statements made by Jesse Colson which are in the record and have been admitted against the defendants in this case occurred at a time when the conspiracy was on and were in furtherance of the cconspiracy, and now counsel wants to ask Agent Murphy about conversations between him and Colson, which clearly took place after Colson's participation in the (1464) conspiracy—that is to say, after his arrest.

I submit that they are irrelevant and have no place in this cross-examination.

The Court: All right, sir. I will overrule the objection. However, if you are going to get into conversations with Colson, I suggest to you that you may get into evidence something that you might not want in evidence.

Mr. Pogoda: I am not asking for the substance of the conversations. I am merely asking how many conversations there were.

The Court: Overruled.

(To the witness) How many conversations were there, about?

Finbarr J. Murphy—for Government—Cross

The Witness: Well, there were quite numerous conversations.

The Court: Ten, twenty, fifty?

The Witness: Twenty or thirty?

By Mr. Pogoda:

Q. Can you tell us, to the best of your recollection, in which conversation the name of the defendant Duke Anfield came up? A. Well, when Jesse Colson decided to cooperate, his name came right up.

(1465)

Q. Well, when was that? How soon before you approached Duke Anfield and had a conversation with him? A. Well, Colson began to cooperate in July, July 27, 1959, I think. And how soon—what? What was the next question?

Q. How soon after that did you have a conversation with Duke Anfield? A. That was after the recording, or in or around that period there before his arrest, December 5, 1959.

Q. So that there was approximately a four-month period between the time you first heard the name of Duke Anfield—was that the first time you heard his name, in July of 1959? A. That's correct.

Q. —until the date of his arrest, some time in December; is that not true? A. I first heard of him in July, and his name kept on cropping up in my conversations with Colson.

* * * *

Finbarr J. Murphy—for Government—Cross

(1468) • • •

Q. When for the first time did the name of Leon Ellis come up in the investigation? A. Leon Ellis' name?

Q. Schoolboy. A. Jesse Colson told me his implication in this.

Q. When? A. That was around July or August.

Q. Of 1959, am I right? A. Yes. As Schoolboy. The name came up as Schoolboy.

Q. Well, now, anywhere in your records do you have any information as to who this Schoolboy is? A. Who the Schoolboy is?

Q. Yes, or where he may be found. A. Prior to his arrest?

Q. At the time you spoke to Jesse Colson. A. We had the general area where he hung around.

Q. Did Jesse tell you that he could be found in (1469) Carter's Bar, or he lived at 141st Street, or somewhere in that area? A. Yes. I believe so, yes.

Q. Didn't he describe Schoolboy to you so that you knew who he was? A. He gave me—he may have. He never knew the fellow's name. Only as Schoolboy.

Q. Did you ever take him down to the police, the Rogues' Gallery, to see if you could identify his picture? A. I don't know whether you have been there, but that is a tedious job. All we had was Schoolboy. And naturally, I checked out the alias. That's all I had. And the alias file never contained no Schoolboy.

Q. Did Jesse Colson tell you that Schoolboy's first name was Leon? A. No. He never did.

Q. When for the first time did you find out his name was Leon? A. When I arrested him and his fingerprints came back.

Q. Until then you say now that you didn't know Schoolboy was Leon Ellis? A. That's correct.

Q. Let me ask you this, Agent Murphy: you were (1470) interested in apprehending Schoolboy Ellis, were you not? A. Yes.

Q. And Colson was cooperating with you in July or August of 1959; is not that true? A. That's correct.

Q. Now tell us, as a law enforcement officer, what you did from July or August, 1959 until Schoolboy was apprehended in 1961, to locate him. What you did to try and apprehend him. A. My particular job—my main interest in this investigation was to obtain evidence against Massiah and the seamen and the longshoremen, if possible. As a Customs agent, that is what I am primarily interested in, to stop the smuggling across the borders. To do that itself takes a lot of work. • • •

• • • • •

(1472) • • •

Now, Agent Murphy, when for the first time did the name of the defendant Leon Aiken come to your attention? A. That came to my attention maybe May 9—the name of Leon Aiken, Leonard Aiken?

(1473)

Q. 1961? A. Yes.

Q. Had his name been mentioned at any time prior to May 9, 1961? A. His proper name?

Q. The name Leon? A. Oh, yes.

Q. By whom? A. By Jesse Colson. The name Leon, right.

Q. When did his name come up? When was that conversation? A. July '59.

Finbarr J. Murphy—for Government—Cross

Q. You were not interested at that time in the sale of narcotics. You were merely interested in the smuggling, the importation of narcotics; is not that true? A. The sale of narcotics always interests me, but we have a jurisdictional agreement between Bureau of Narcotics and ourselves. We will handle the smuggling across the borders. They will handle inside the cities.

Q. Didn't you tell me, in response to the question about Leon Ellis, that your concern and your investigation in this case only concerned itself with (1474) the smuggling and nothing else?

Mr. Starkey: Objection, your Honor. He said, "primarily interested in the smuggling." I will object to counsel paraphrasing the testimony.

The Court: I think he said "primarily." I assume you will accept that.

Q. Did you get a description of Leon, the John Doe in the indictment, from the defendant Colson? A. Yes.

Q. That was in 1959? A. 1959, right.

Q. Now, tell the Court and jury what you did in apprehending Leon between July, 1959 and May 9, in 1961. A. Well, I made inquiries of seamen. I made inquiries of informants I have. My work took me up to the Harlem squads, the precinct squads. I made inquiry there. I was only supplied with a name, had no picture, had no last name.

Q. Jesse Colson was cooperating with you, wasn't he, in July or August of 1959? A. Yes; he was.

Q. Did you ever take Jesse Colson to the area in which he said he was doing business with Leon Aiken? A. No.

I told Jesse to keep an eye out for Leon. (1475) I had no tangible evidence as to who he was. And if he did turn him up, to let me know.

Q. You did set up the defendants Massiah and Anfield for a meeting between the two, between Colson and him; is that not true? A. With the cooperation of Jesse, yes.

Q. That is right. Did you ask Jesse to cooperate with you to locate the defendant Leon, that you were looking for? A. Oh, yes.

• • • •

(1481) • • •

Q. (Continuing) At the time of your conversations with Colson and Torres, all you had was their word, am I right? A. As to the implication of any of these defendants?

Q. Yes. A. Well, among other things, besides the conversation, I had the roll of tape, which I figured was evidence, piece of cloth, names of Rene, telephone number, Chile, toll slips, calls made by Colson, which matched up with the telephone number. I had all those little (1482) pieces of information.

• • • •

(1521) • • •

Q. Were you looking for Leon Ellis? A. Yes; I was.

Q. Were you looking for Leon Ellis because he fit the description that Jesse Colson had given you about this male Negro of medium complexion, forty years old, five feet nine 165 pounds? A. No. I knew Schoolboy was not Leon.

Q. You knew that? A. Yes. Positively.

Finbarr J. Murphy—for Government—Cross

(1522)

Q. Jesse spoke to you specifically and said, "There is a Leon Ellis and there is a Leon whose last name I don't know"? A. No. I asked him. Schoolboy is Schoolboy and Leon is Leon.

• • • •

(1554) • • •

Cross-examination by Mr. Archer:

Q. Mr. Murphy, when for the first time did the name Icky Thorn come to your attention and knowledge? A. Icky Thorn—around August of 1959.

Q. In what connection? A. In what connection?

Q. Yes. A. Jesse Colson told me that he was one of the bigger buyers of the cocaine that he and Massiah smuggled in.

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~~No. 275 Misc.~~

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United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

LEONARD ROYAL AIKEN,

Appellant.

APPENDIX TO APPELLANT'S BRIEF

UNITED STATES COURT OF APPEALS
FILED
NOV 6 1961
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

CARSON DEWITT BAKER
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New York, N. Y.

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Docket Entries Re Leon Aiken

UNITED STATES v. 12. JOHN DOE ("LEON")
Count 8, t/n Leonard Royal Aiken T. 21, Secs. 173-174, U.S. Code Conspiracy to violate the narcotics laws.

3-3-61	Filed Indictment.
3-3-61	Warrants of arrest ordered for Granville Smith, Nick Holiday and John Doe, a/k/a "Leon" Bicks, J.
3-7-61	John Doe a/k/a Leon—Bench Warrant Issued as to all three defendants on 3-3-61.
5-13-61	John Doe, a/k/a Leon, true name—Leonard Royal Aiken—Defendant brought to court on warrant. Arraigned in chambers, following his arrest on warrant. Bail fixed at $20,000. Remanded in lieu of bail. Weinfeld, J.
5-15-61	Leonard Royal Aiken—Pleads Not Guilty. Bail of $20,000. fixed on 5-13-61 by Judge Weinfeld continued in the same amount. Defendant remanded in lieu of bail. Dimock, J.
	Leonard Aiken—Filed notice of appearance by Morris Somers, 1501 Broadway, New York City.
5-22-61	Leonard Aiken—Filed warrant dated 3-3-61, and entered marshal's return. Warrant executed 5-13-61.
5-22-61	Leonard Aiken—Filed remand, dated 5-13-61. Weinfeld, J.
6-13-61	Trial begun before Judge Skelly Wright as to defendants . . . , Leonard Aiken . . . On

	motion of the Government the following defendants . . . Leonard Aiken Ordered Remanded. Wright, J.
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	Trial continued and concluded—Defendants, Leonard Aiken motion for a mistrial—Granted —Wright, J. Defendants remanded.
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6-16-61	Trial Continued.
6-19-61	Trial Continued.
6-20-61	Trial Continued.
6-21-61	Trial Continued.
6-22-61	Trial Continued.
6-23-61	Trial Continued, on motion of the Government—Bail fixed as to the following defendants . . . Leonard Aiken—Bail fixed at $30,000. All defendants—remanded in lieu of bail. Wright, J.
6-26-61	Trial Continued.
6-27-61	Defendant Aiken moved to dismiss count 8—Denied.
6-28-61	Trial Continued.
6-29-61	Trial Continued and concluded. Jury Verdict: Defendant . . . Aiken Guilty on count 8. Jury Polled. Defendants . . . Aiken move to set aside the verdict and for a new trial. Denied. J. Skelly Wright, J.

Docket Entries Re Leon Aiken

6-29-61	Leonard R. Aiken—Filed judgment Thirteen (13) years on count 8 at a place of confinement to be designated by the Attorney General of the United States remanded Bail pending appeal is fixed at $50,000. J. Skelly Wright, U.S.D.J.
6-29-61	Issued commitment and copies.
6-29-61	Filed information charging defendant Leonard Royal Aiken with a prior narcotic offense. Memo endorsed:—The defendant admits that he is the person previously convicted as charged in the within Information. Wright, J.
6-30-61	Leonard Royal Aiken—Filed Notice of Appeal to U.S.C.A. from a judgment of conviction (7-5-61) mailed copy to Warden, Federal Detention Headquarters, New York City. $5. —A-E—
7-5-61	Leonard Aiken—Filed remand, dated 6-13-61 J. Skelly Wright, J.
7-5-61	Filed remand; dated 6-23-61. J. Skelly Wright, J. Defendant released on bail 6-23-61. E. N. Bishopp, U.S. Comm'r.
Jun 30-61	Leonard Royal Aiken filed Notice of Appeal to U.S.C.A. from Judgment of conviction (7-5-61). Mailed copy to Warden Federal Detention Headquarters, New York City.

Indictment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

—v.—

WINSTON MASSIAH, JESSE COLSON, MITCHELL ANFIELD, GRANVILLE SMITH, NOEL MAXWELL, WILLIAM ADAMS, JOHN HENRY PURRY, CLARENCE WHITE, NICK HOLIDAY, ICKY THORN, SYLVIA FERRIS, JOHN DOE, a/k/a "LEON", meaning thereby to describe a Negro male of medium complexion, with black hair and a medium build, approx. 40 yrs. old, approx. 5'9" tall, and weighing approx. 165 lbs.,

Defendants.

The Grand Jury charges:

On or about the 6th day of May, 1958, in the Southern District of New York, WINSTON MASSIAH, JESSE COLSON and MITCHELL ANFIELD, the defendants, did unlawfully, wilfully and knowingly bring on board, and have in their possession and control on board a vessel of the United States, to wit, the S.S. Santa Maria, while engaged on a foreign voyage, a narcotic drug, to wit, approximately 3 pounds, 8 ounces and 256 grains of cocaine, not constituting a part of the cargo entered in the manifest or part of the ship's stores.

(Title 21, United States Code, Section 184a and Title 18, United States Code, Section 2.)

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SECOND—COUNT

The Grand Jury further charges:

On or about the 6th day of May, 1958, in the Southern District of New York,

WINSTON MASSIAH, JESSE COLSON and
MITCHELL ANFIELD,

the defendants, unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a narcotic drug, to wit, approximately 3 pounds, 8 ounces and 256 grains of cocaine,

after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, Sections 173 and 174, United States Code.
Title 18, Section 2, United States Code.)

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THIRD—COUNT

The Grand Jury further charges:

On or about the 18th day of June, 1956, in the Southern District of New York,

GRANVILLE SMITH,

the defendant, unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a narcotic drug, to wit, approximately 50 grams of cocaine,

after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, Sections 173 and 174, United States Code.)

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FOURTH—COUNT

The Grand Jury further charges:

On or about the 18th day of June, 1956, in the Southern District of New York,

JOHN HENRY PURRY, CLARENCE WHITE and
NICK HOLIDAY,

the defendants, unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a narcotic drug, to wit, approximately 50 grams of cocaine,

after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and

brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, Sections 173 and 174, United States Code.)

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FIFTH—COUNT

The Grand Jury further charges:

On or about the 31st day of July, 1956, in the Southern District of New York,

GRANVILLE SMITH,

the defendant, unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a narcotic drug, to wit, approximately 25 grams of cocaine,

after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, Sections 173 and 174, United States Code.)

Indictment

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SIXTH—COUNT

The Grand Jury further charges:

On or about the 31st day of July, 1956, in the Southern District of New York,

NOEL MAXWELL,

the defendant, unlawfully, wilfully and knowingly did receive, conceal, sell and facilitate the transportation, concealment and sale of a narcotic drug, to wit, approximately 25 grams of cocaine,

after the said narcotic drug had been imported and brought into the United States contrary to law, knowing that the said narcotic drug had theretofore been imported and brought into the United States contrary to law in that the importation and bringing of any narcotic drug into the United States, except such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only, is prohibited.

(Title 21, Sections 173 and 174, United States Code.)

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SEVENTH COUNT

The Grand Jury further charges:

On or about the 6th day of May, 1958, in the Southern District of New York,

WINSTON MASSIAH,
JESSE COLSON and
SYLVIA FERRIS,

the defendants, unlawfully, wilfully and knowingly did purchase, possess, dispense and distribute a certain narcotic

drug, to wit, approximately 3 pounds, 8 ounces and 256 grains of cocaine,

in that the said defendants did not purchase, possess, dispense and distribute said narcotic drug in or from the original stamped package.

(Title 26, Sections 4701, 4703, 4704(a), 4771(a) and 7237(a), United States Code.)

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EIGHTH COUNT

The Grand Jury further charges:

1. From on or about the 1st day of January, 1956, and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, and elsewhere, WINSTON MASSIAH, JESSE COLSON, MITCHELL ANFIELD, GRANVILLE SMITH, NOEL MAXWELL, WILLIAM ADAMS, JOHN HENRY PURRY, CLARENCE WHITE, NICK HOLIDAY, ICKY THORN, SYLVIA FERRIS, and JOHN DOE, a/k/a "LEON", meaning thereby to describe a Negro male, of medium complexion, with black hair and a medium build, approximately 40 years old, approximately 5'9" tall and weighing approximately 165 lbs., the defendants, and Fadul Rene Harb Huasaff, Richard Roe, a/k/a "Rene", meaning thereby to describe a Caucasian male, of a light complexion with dark hair and a medium build, 35 to 45 years old, approximately 5'5" tall and weighing approximately 165 lbs., Amanda Huasaff, Helen Hoe, meaning thereby to describe the sister of Amanda Huasaff, a Caucasian female of a light complexion with dark hair and a medium build, approximately 53 years old, approximately 5'5" tall and weighing approximately 135 lbs., Paul King, James Barber, James Hunter, James Billips, Tony Gumbs, Joe Perry, Gerald Youngblood, Clyde Cadogan, Paul Washington,

Sonny Campbell, Arthur Conquist, Harold Hoe, meaning thereby to describe the brother-in-law of Amanda Huasaff, a Caucasian male, of light complexion with black hair and a medium build, approximately 55 years old, approximately 5'5" tall and weighing approximately 160 lbs., and George Goe, a/k/a "Canales", meaning thereby to describe a Caucasian male with an olive complexion, with dark hair and a medium build, 35 to 45 years old, approximately 5'8" tall and weighing approximately 150 lbs., named as co-conspirators but not as defendants, and divers other persons to the Grand Jury unknown, did unlawfully, wilfully and knowingly combine, confederate, conspire and agree together and with each other to commit certain offenses against the United States, to wit, to violate Sections 173 and 174 of Title 21, United States Code.

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2. It was a part of said conspiracy that the above-mentioned defendants, and their co-conspirators, would unlawfully, wilfully and knowingly import and bring narcotic drugs, to wit, cocaine, into the United States, in violation of Sections 173 and 174 of Title 21, United States Code.

3. It was further a part of said conspiracy that the above-mentioned defendants, and their co-conspirators, would unlawfully, wilfully and knowingly receive, conceal, buy, sell and facilitate the transportation, concealment and sale of narcotic drugs, to wit, cocaine, the exact amount thereof being to the Grand Jury unknown, after said narcotic drugs had been imported and brought into the United States contrary to law, and knowing that said narcotic drugs had been imported and brought into the United States contrary to law, in violation of Sections 173 and 174 of Title 21, United States Code.

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, the following overt acts, among others, were committed in the Southern District of New York:

1. On or about June 18, 1956, the defendants GRANVILLE SMITH, JOHN HENRY PURRY, CLARENCE WHITE and NICK HOLIDAY, had a conversation in a building in the vicinity of 100th Street and Manhattan Avenue, New York, New York.

2. On or about July 31, 1956, the defendants GRANVILLE SMITH, WINSTON MASSIAH and JOHN HENRY PURRY had a conversation in a bar at 10th Avenue and 17th Street, New York, New York.

3. On or about July 31, 1956, defendant WINSTON MASSIAH had a conversation with co-conspirator James Barber aboard the vessel S. S. Santa Luisa.

4. On or about July 31, 1956, defendants NOEL MAXWELL and WINSTON MASSIAH had a conversation at 19 West 128th Street, New York, New York.

5. On or about July 31, 1956 defendants NOEL MAXWELL, WILLIAM ADAMS and WINSTON MASSIAH had a conversation at 19 West 128th Street, New York, New York.

6. In or about the month of August, 1956 defendants MITCHELL ANFIELD, JOHN HENRY PURRY, CLARENCE WHITE and NICK HOLIDAY had a conversation in a building in the vicinity of 100th Street and Manhattan Avenue, New York, New York.

Indictment

7. On or about October 8, 1956 defendants NOEL MAXWELL, WILLIAM ADAMS and WINSTON MASSIAH had a conversation at 19 West 128th Street, New York, New York.

8. On or about October 10, 1956 defendants NOEL MAXWELL, WILLIAM ADAMS, MITCHELL ANFIELD and WINSTON MASSIAH had a conversation at 19 West 128th Street, New York, New York.

9. On or about October 11, 1956 defendants JOHN HENRY PURRY, CLARENCE WHITE and NICK HOLIDAY had a conversation in a building in the vicinity of 100th Street and Manhattan Avenue, New York, New York.

10. On or about October 11, 1956 defendants CLARENCE WHITE, WINSTON MASSIAH and NICK HOLIDAY had a conversation at 19 West 128th Street, New York, New York.

11. On or about December 10, 1956 defendants JOHN HENRY PURRY, CLARENCE WHITE and NICK HOLIDAY had a conversation in a building in the vicinity of 100th Street and Manhattan Avenue, New York, New York.

12. On or about December 10, 1956 co-conspirator James Hunter went to the vicinity of 8th Avenue and 16th Street, New York, New York.

13. On or about December 10, 1956 defendants MITCHELL ANFIELD, JOHN HENRY PURRY, CLARENCE WHITE and NICK HOLIDAY had a conversation in a building in the vicinity of 100th Street and Manhattan Avenue, New York, N.Y.

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14. On or about June 4, 1957 co-conspirator James Barber went to a bar in the vicinity of 8th Avenue and 16th Street, New York, New York.

15. On or about July 17, 1957 co-conspirator James Hunter went to a bar in the vicinity of 8th Avenue and 16th Street, New York, New York.

16. On or about July 31, 1956 co-conspirator James Barber went to the vicinity of 8th Avenue and 16th Street, New York, New York.

17. On or about August 26, 1957 co-conspirator James Hunter went to the vicinity of 8th Avenue and 16th Street, New York, New York.

18. On or about November 18, 1957 co-conspirator James Billips went to the vicinity of 17th Street and 9th Avenue, New York, New York.

19. On or about December 30, 1957 co-conspirator James Billips went to the vicinity of 9th Avenue and 17th Street, New York, New York.

20. On or about February 10, 1958 co-conspirator James Billips went to a bar in the vicinity of 9th Avenue and 17th Street, New York, New York.

21. On or about May 6, 1958 defendant WINSTON MASSIAH was in possession and control of a quantity of adhesive tape aboard the vessel S.S. Santa Maria.

(Title 21, United States Code, Sections 173 and 174.)

MORTON S. ROBSON
United States Attorney

.....
Foreman

Judgment and Commitment

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

No. 61 Cr. 206

[SAME TITLE]

On this 29th day of June, 1961 came the attorney for the government and the defendant appeared in person and by counsel.

IT IS ADJUDGED that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by a jury of the offense of unlawfully, wilfully and knowingly conspiring to violate the narcotics laws (Title 21, sections 173 and 174, U.S. Code) as charged in Count 8

—AND—

The defendant LEONARD ROYAL AIKEN, duly represented by counsel, having admitted that he is the same person previously convicted on ONE separate Federal Narcotics violation, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General of his authorized

representative for imprisonment for a period of THIRTEEN (13) YEARS on Count 8.

Bail pending appeal is fixed at $50,000.

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IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

s/ J. SKELLY WRIGHT
United States District Judge
s/ HERBERT A. CHARLSON
Clerk

Notice of Appeal

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Name and Address of Appellant:

LEONARD ROYAL AIKEN
Federal Detention Headquarters
428 West Street
New York City, N.Y.

Name and Address of Appellant's Attorney:

MORRIS SOMERS, Esq.
1501 Broadway
New York City, N.Y.

Offense:

Violation of secs. 173 and 174 of Title 21, United States Code.

Date of Judgment:

June 29, 1961.

Sentence:

13 years imposed following trial and conviction by jury.

Notice of Appeal

Now confined in Federal Detention Headquarters, 428 West Street, New York City, N.Y.

The appellant hereby appeals from the judgment of conviction and sentence thereon to the United States Court of Appeals, Second Circuit.

MORRIS SOMERS
Attorney for Appellant
1501 Broadway
New York City, N.Y.

Dated: New York, June 29, 1961

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Excerpts From Testimony

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

61 Cr. 206

[SAME TITLE]

Before:

HON. J. SKELLY WRIGHT, *D. J.*,

and a Jury.

New York, June 15, 1961,
10:30 o'clock a.m.

APPEARANCES:

ROBERT M. MORGENTHAU, Esq.,
United States Attorney,
for the Government;

By James G. Starkey, Esq.,
Assistant United States Attorney.

ROBERT J. CARLUCCIO, Esq.,
Attorney for Defendant Massiah.

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EUGENE K. JONES, Esq.,
Attorney for Defendant Colson.

I. EDWARD POGODA, Esq.,
Attorney for Defendant Anfield.

Leon Ellis—for Government—Direct

JESSE ZASLAV, Esq.,
Attorney for Defendants Maxwell, Adams and Purry.

ABRAHAM SOLOMON, Esq.,
Attorney for Defendant White.

NORMAN ARCHER, Esq.,
Attorney for Defendant Thorn.

EARL MCHUGH, Esq.,
Attorney for Defendant Ferris.

MORRIS SOMERS, Esq.,
Attorney for Defendant Aiken.

Mr. Starkey: The Government is ready.
Mr. Solomon: The defendants are ready.

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New York, June 20, 1961
10:30 o'clock a.m.

• • • • •

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LEON ELLIS, called as a witness on behalf of the government, being first duly sworn, testified as follows:

Direct Examination by Mr. Starkey:

Q. Mr. Ellis, have you been convicted of any crimes? A. Yes.

Q. Will you tell the Court and jury when and what crimes you have been convicted of? A. I was convicted for disorderly conduct in 1951, and policy, November 27, 1960.

Q. Do you know a man by the name of Jesse Colson? A. Yes.

Q. When did you first meet him? A. In '57.

Q. Did there come a time thereafter when you had a conversation with him about cocaine? A. Yes.

Mr. Somers: I object to that, your Honor, as distinctly leading.

Mr. Starkey: It's a preliminary question, your Honor.

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The Court: Don't lead your witness, please. I think the answer is already in, but don't lead any more.

Q. When did this conversation take place, this first conversation? A. Around about the fall of '57.

Q. And what did you say to Jesse and what did Jesse Colson say to you?

Mr. Pogoda: Can we have the place, if the Court please?

Q. Do you recall where this conversation took place? A. A. Yes. Jesse had a rented car, and it was in the car.

The Court: Where was the car?

The Witness: We was driving down the avenue, down Seventh Avenue.

Q. What was said by him and what was said by you on this occasion? A. I asked him, I said—

Mr. Archer: Your Honor, I would object to this line of questioning. Jesse Colson is not a party

defendant here in this matter, and I don't think this testimony should be elicited which would be binding

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upon these defendants.

The Court: That is overruled.

What did he say to you and what did you say to him?

The Witness: I asked him—I heard he was bringing in cocaine, and I would like to work for him so I could make a few dollars.

He said, "You don't want to mess with nothing like that."

I said, "Yes, I would like to make a few dollars."

He said, "If you get a customer, give me a call and it will let you know."

By Mr. Starkey:

Q. Did there come a time when you discussed this conversation that you just described with someone else? A. Yes.

Q. Who was that? A. A fellow named Tillie.

Q. And what was said between you and Tillie?

Mr. Pogoda: That is objected to, if the Court please. Neither he nor this fellow Tillie are mentioned in the indictment here, and this is purely

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hearsay.

The Court: I will hear from the government.

Is Tillie alleged to be a conspirator?

Mr. Starkey: The government offers proof that he was, your Honor. He is not designated in the indictment as such.

Mr. Somers: I object to that.

Mr. Pogoda; How can we be prepared to meet something that is not in the indictment as part of the conspiracy?

The Court: Did you know of Tillie at the time the indictment was drawn?

Mr. Starkey: No, we did not, your Honor.

The Court: Are you suggesting that this is new evidence that was developed since the indictment?

Mr. Starkey: Yes, your Honor. However, if the Court—

The Court: I will sustain the objection. I think you are going a little far.

By Mr. Starkey:

Q. After you had this conversation with Tillie, did there come a time when you again talked to Jesse? A. Yes.

Q. Where did you speak to him? A. I called him from 225th Street.

Q. And when did this take place? A. This was November or December of '57.

Q. Now, after the conversation with Tillie, when you called up Jesse Colson, what did you say and what did Jesse say? A. I told Jesse that I had a man who was interested in some cocaine, and he asked me how much money he had, and I told him that he had $300. I said, "But the man wants to come to the house with me to receive the coke."

And Jesse said, "That is no good." He said, "If the guy can't trust you, just tell him to forget about it."

Q. Now, after that, did you have a conversation with Tillie again? A. Yes.

Mr. Carluccio: Your Honor, I don't want to interrupt, but I just want to know, when he speaks about Tillie, can he give, if possible, Tillie's real name. I know of a Tillie and I want to know if it is the same one he is talking about.

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The Court: If the government knows, tell him.

By Mr. Starkey:

Q. Do you know Tillie's full name? A. No, I don't know his full name.

Mr. Carluccio: Fine. Thank you.

Q. Now, you had a conversation with Tillie again after the phone call? A. Yes.

Q. And did there come a time after that conversation when you saw Jesse? A. Yes.

Q. What happened on that occasion and where did you see him? A. I went to his house and told him how much money I had, and he gave me a package of cocaine.

Q. How much money did you have? A. $300.

Q. From whom had you received it? A. I received it from Tillie.

Q. Was there any other conversation up in Jesse Colson's apartment during this time that you are talking about? A. He told me that the man would be satisfied

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with this package because it is pure cocaine.

Q. Do you know how much was in the package? A. No, I couldn't—I think it was between six and eight spoons.

Mr. Carluccio: Objection. He is supposed to testify as to his knowledge and not what he thinks it is.

Leon Ellis—for Government—Direct

By Mr. Starkey:

Q. Did you have any conversation with Jesse as to how much was in the package? A. No. He told me it was half a piece.

The Court: Half a piece?

The Witness: Half an ounce.

Q. Now, after you left Jesse's apartment, what did you do? A. I came back to the bar and picked up Tillie.

Q. Where did you go? A. We came down to the Woodside Hotel.

Q. Where is that located? A. That is 141st Street, on Seventh Avenue.

Q. Did you have a conversation with Tillie there? A. Yes. We went—

Q. Without giving the conversation, where did you go

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after the conversation? A. We went around to 141st Street, between Seventh and Eighth Avenue.

Q. And what did you do there?

Mr. Pogoda: I will object to it, if the Court pleases. It is not one of the overt acts charged in the indictment. And then, again, whatever his actions were with Tillie aren't binding upon these defendants.

The Court: That is overruled. I think the government will connect it up.

Proceed.

By Mr. Starkey:

Q. What did you do? Did you stay on the street on 141st Street, or did you go into a building? A. We went into

an apartment building and went up a couple of flights to a person's house.

Q. What did you see when you got there? A. I saw a lady, and me and Tillie went in a small room in the apartment.

Q. Who was carrying the package? A. Tillie was carrying the package.

Q. Now, there was no one up there but the lady when you went up there? A. Yes.

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Q. Did there come a time when someone else arrived? A. Yes.

Q. Who was that? A. Leon.

Q. Now, a man you know—

Mr. Somers: What is the time, please? I would like the date.

The Court: Give the time.

Q. When did this occur, as nearly as you can fix the date? A. It was the last of November or the first few weeks in December of '57.

Q. Now, what happened when Leon arrived? Was there a conversation?

The Court: Who is Leon?

The Witness: That person right over there.

The Court: Where?

By Mr. Starkey:

Q. What man have you just pointed to? A. The first man in the second row behind the bar there.

Q. How is he dressed? A. He's got on a suit, a white

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shirt and tie.

Mr. Starkey: May the record show that the witness has identified the defendant Leonard Aiken.

By Mr. Starkey:

Q. Was there any conversation when he arrived? A. Yes.

Q. What was said and by whom? A. He asked Tillie did he get the stuff.

Q. What did Tillie say? A. Tillie told him, "Yes."

Q. What happened then? A. Tillie gave it to him, and he was measuring it out.

Q. Was there any conversation at that time? A. He said it was a little short and asked me could I get in contact with my man. And I told him no, I couldn't contact him no more tonight.

He said, "Forget about it then."

Q. What happened after that? A. Well, Tillie asked Leon was he going around to '36th Street. He answered, "Yes." And he said, "Why don't you let Schoolboy take it around for you?"

Q. Who is Schoolboy? A. I am Schoolboy by nickname.

Q. What did the defendant Aiken say? A. He asked me would I take it. I said, "Yes."

Q. What happened then? A. And he gave me $15 and I met him around '36th Street.

Q. You say "'36th"? A. 136th Street, between Seventh and Lenox Avenue.

Q. And did you go there by yourself? A. Yes.

Q. What did you do with the package when you got there? A. I saw him in the car and I gave it to him and kept walking.

Mr. Carluccio: Who is "him"?

The Witness: Leon.

Q. Now, did the defendant Aiken ever complain to you thereafter that what he received was not cocaine?

Mr. Somers: I object to that, your Honor.

The Court: Just a minute, please. Don't lead your witness. Rephrase the question.

Mr. Starkey: Your Honor, it is not by way of

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leading. The government offers to show the absence of the conversation rather than show a conversation. I merely asked the question to receive a yes or no answer.

The Court: It still can be leading. But, in any event, the answer is no to the question? Is that what you are trying to show, that there was no such conversation?

Mr. Starkey: That the defendant never complained that it was not cocaine.

The Court: Did you ever have any further discussion with Leon Aiken about this particular cocaine?

The Witness: No.

The Court: All right. Take the witness.

By Mr. Starkey:

Q. Incidentally, Mr. Ellis, are you familiar with the appearance of cocaine? A. Yes.

Q. What does it look like? A. Sugar.

Q. Did you see the contents of this package? A. Which package are you speaking of?

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Q. The one that you delivered to the defendant Aiken? A. Yes.

Q. What did it look like? A. Coke. It was in a sugar form.

Q. Did there come a time thereafter when you again had a conversation with Jesse Colson about what had occurred, about what you just testified? A. On the question that I just answered?

Q. Well, about the same subject matter. A. Yes, about coke, yes.

Q. When did this conversation take place? A. This was the early part of January of '58.

Q. What did Jesse say to you and what did you say to him? A. Jesse told me that he had a package of coke, I think it was—it was 10 to 12 ounces, and he said he would like to get rid of it in one lot, and he told me if I could find a nice customer, that he would let him have it at the wholesale price.

Q. What did you say? A. I said, "Okay, I will look around and then see what I can do."

Q. Did there come a time when you discussed this cocaine

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with anyone? A. Yes.

Q. With whom did you discuss it? A. I discussed it with Leon.

Q. Where did this discussion take place? A. 136th Street.

Q. What did you say and what did he say? A. Well, I asked him, I said, "My man has got a package of coke," I said, "and he said it's approximately 12 ounces," and I asked him was he interested in it if I could get it for him.

Q. What did Leon say? A. Leon said, "Yes, I will take the whole thing if it is pure."

And I told him, I said I didn't know exactly how pure it was but I would see Jesse and find out how much it was and how much did he want for it.

Q. And did you talk about price and quantity with Jesse Colson? A. Yes.

Q. What did you do after that? A. I came back and told Leon about how much it was and how much he wanted for it.

Q. And what did you say to him? A. I told him, I said,

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"My man says it's pure, and it's approximately 12 ounces, between 10 and 12 ounces, and he would let you have it for $5,000."

Q. Was there any further conversation at that time? A. He told me to come by tomorrow night, the following night, a little after dark.

Q. And did there come a time when you saw him again? A. Yes.

Q. When was it and where? A. It was the next night, on 136th Street.

Q. Who was there at that time? A. I saw him in his car.

Q. What was the conversation, if any? A. And he told me that—

The Court: Who is "he"?

The Witness: Leon.

The Court: All right.

A. He told me that "Here are $5,000," and, you know, he said he was trusting me this time, but the next time it's going to be—he give me the money and receive the coke, because either he is doing all the trusting and nobody else is doing any trusting.

—569—

And I took the $5,000 and met Jesse Colson on 140th Street and Seventh Avenue, and we left from 140th Street and went to 94th Street and Broadway.

Q. Do you know who lived there at that time? A. No, I didn't know who lived there.

Q. Did you go into a building there? A. Yes, we went into a building.

Mr. Somers: Who is "we"?

The Witness: Me and Colson.

A. We went into a building and went a couple of flights upstairs and went into an apartment, and Icky was there.

Q. Icky? A. Yes.

Q. Do you know what Icky's last name is? A. Yes.

Q. Do you see Icky in the courtroom? A. Yes.

Q. Will you point him out, please? A. The last person on the end.

Mr. Starkey: May the record show that the witness has identified the defendant Thorn.

Q. What happened after you and Jesse Colson entered

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the apartment? A. Well, when we got into the room, Icky—Jesse told Icky to ask the man for the coke. And Icky said, "How much?"

Jesse told him, "All of it."

Icky told Jesse that—he said, "Man, you can't let him have all of it because I got a man coming over in a few minutes, he wants five pieces."

Well, Jesse said, "I got the cash money right here now."

Icky told Jesse, he said, "I could cut it and you could almost double your money."

And Jesse said, "Yes, that is true."

"I will tell you what I will do, Schoolboy," he said, "I will give you half of the jar for your man and half of the jar for you, Icky, for your man."

And so Jesse went into the room, he was counting the money out on the bed, and me and Icky was in the small kitchen, like a dinette, on the table and Icky was measuring the coke from one jar to the other. And after he got it measured, Jesse came in and taped the jar up and gave me the jar of coke for myself, and $2,500 back. He told me to tell my man that that was the best he could do because he had his other boy who had a customer.

—571—

Q. What did you do then? A. I took the jar and the $2,500 and came back to 136th Street.

Q. And what happened at 136th Street? A. I saw Leon in the car and gave him the jar of coke and the $2,500 back, and explained why it was like that.

Q. What did you say? A. I told him, I said, "My man had another customer for another boy of his and all he could give me was half the jar."

Q. Did there come a time thereafter when you saw Leon and Jesse Colson together? A. Yes.

Q. When was that? A. That was around about the third week in January of '58.

Q. And will you tell the Court and jury what happened on that occasion and how it came about, if you know?

Mr. Pogoda: May we have a place?

The Court: Where was it?

The Witness: It was 138th Street and Lenox Avenue, in a small bar.

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The Court: Whose bar?

The Witness: It was a small bar.

The Court: You don't know the name of the bar?

The Witness: I don't know the name of the bar.

By Mr. Starkey:

Q. Do you know how it happened that they got together? A. Yes. I told Jesse what Leon said, that he wasn't going to send his money—he don't know what is going to happen to his money, and I said he wasn't going to trust me any more with his money.

And Jesse said, "Well, he seemed like a big man." He said, "I would like to meet him."

I said, "Okay, I will try to set it up for you" the next day to meet him.

Jesse said, "Okay."

So I went and told Leon what Jesse said, and he said, yes, he would meet him.

So I told him I would bring him down to him the next day. I said, "I will be down about 2:30 or 3 o'clock."

He said, "Okay."

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And I got Jesse the next day and brought him down to the bar, and I left him in the bar and went over to '36th Street and saw Leon and told him where we were. And he came over a little later, after, and I introduced him to Jesse.

Q. What did you say when you introduced him to Jesse? A. I told Jesse, I said, "This is Leon, and this is the man that bought the stuff."

Q. Did you hear any conversation thereafter? A. No. They were sitting in a booth and I was having a beer.

Q. Now, did there come a time thereafter when you left New York? A. Yes.

Q. When was that? A. That was January 28, 1958.

Q. What was the reason why you left New York? A. My mother passed away.

Q. Where did you go? A. I went to Chicago and Mississippi.

Q. How long were you away? A. I was away until February 23rd, I got back to New York.

—574—

Q. After you got back, did there come a time when you saw Jesse? A. Yes, I called him up and told him that I was back in New York, and he said he would be down to see me in a few minutes, he had—he wanted to talk to me. And he came down about half an hour later.

Q. What was the conversation you had with him at that time? A. I asked him how was he getting along.

He said, "I don't have any more coke because me and Duke sold the last to Leon while you was away."

Q. While you were away? A. Yes.

The Court: Who is Duke?

The Witness: That is the person in the white shirt.

Mr. Starkey: May the record show that the witness has identified the defendant Mitchell Anfield.

Q. Did there come a time after you returned when you had a conversation with Duke? A. Yes.

Q. What was said—

—575—

Mr. Pogoda: May we have a date and a place?

By Mr. Starkey:

Q. How soon after you returned did you see him? A. It was February 23rd.

Q. And will you tell the Court and jury how it happened that you went to see him? A. Well, Jesse told me, he said, Marty was mad at him because he wouldn't let him use his car no more, you know. He said it hurt him because they had been so close for so many years, and he told me to go down to his house and see what he was angry about.

Q. Did you do so? A. Yes. I went down to his girl friend's mother's house, and he was down there.

Q. Where was this? A. I think it is near Fifth Avenue, 118th Street, 117th Street, somewhere in there.

Q. Did you have a conversation with him at that time? A. Yes.

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Q. With Duke? A. Yes.

Q. What was said? A. I asked Duke what was the matter with him and Jesse. And Duke told me, he said Jesse shouldn't have did him that way. He loaned him the car and he parked the car—Duke parked the car—and while the car was parked Jesse came back and moved the car and took it home, and was calling him up, asking him where was the car at and "When are you going to bring the car," and he had the car all the time.

And Duke said, "Yes," he said, "he had been cheating me in the business with money and coke all the time while we was in business." He said, "I am just fed up with him. I don't want to be in business with him no more."

Q. Now, did there come a time after this conversation when you talked to Duke about a package? A. Yes.

Q. When did that take place? A. I am not very sure on this, but I think it was in March of—

Q. Of '58? A. '58, yes.

Q. Where did this conversation take place? A. Well,

—577—

Duke came up to 140th Street, on the avenue, and saw me, and tole me he had a package for my man, and he asked me if I want to go around to '36th Street with him.

Q. What did you say? A. I said, "Okay."

We went around to '36th Street and we was looking for Leon—

Mr. Somers: I object to that, your Honor, who he was looking for. It is a conclusion.

The Court: Well, why were you looking for Leon?

The Witness: Because Duke had a package for him.

The Court: How did you know Duke had a package for him?

The Witness: He told me.

The Court: Duke told you that?

The Witness: Yes.

The Court: Overruled.

By Mr. Starkey:

Q. Did you see Leon there when you went to 136th Street? A. No, not right then, but about an hour or an hour and

—578—

a half later.

Q. Where did you spend the hour or hour and a half? A. I was right up over the club. Duke had a friend up

there, she was a girl, and we went up there and stayed up her house about an hour or an hour and a half.

Q. Then what happened? A. Then I came back downstairs and I saw Leon and I told him that my man was looking for him.

He said, "Yes?" He said, "Where is he at?"

I said, "Upstairs there, over the club."

He said, "Go upstairs and get him and I will be sitting in the car."

Q. What did you do then? A. I went upstairs and got Duke, and we came back to the car.

Then we pulled off and Duke gave Leon the package and Leon gave him some money. I don't know how much money it was, what was in the package.

Q. What happened after that? A. He put us out and me and Duke went down to his girl friend's mother's house, and he gave me $75, and I came on back uptown.

—579—

Q. He gave you $75? A. Yes.

Q. All right. Now, did there come a time in the following summer when—

The Court: Who gave you the $75?

The Witness: Duke.

Q. Did there come a time the following summer when you talked to Jesse on the telephone? A. Yes.

Q. How closely can you fix the date? A. It was either late May or early June. That is the closest I can fix it.

Q. And what was said on that occasion? A. He asked me that he wanted to make a telephone call out of the country, and he wanted to know could I find somebody that he could use the phone because he couldn't use his and because he was tapped.

Mr. Carluccio: What year?

The Court: Tell us the year.

The Witness: '58. 1958.

The Court: And the date, as close as you can remember it?

The Witness: It was either late May or June.

—580—

The Court: All right, take the witness.

By Mr. Starkey:

Q. And what was it that he said? A. That his telephone was tapped and he couldn't make any calls on it out of the country.

Q. And what did you do? A. I asked my godmother about letting Jesse make a long-distance call on the telephone, and she said, "Yes, Okay," as long as they will pay the bill it would be all right.

And I said, "Okay."

So then I got Jesse the following day, the next day, or a couple of days later, and he made the telephone call to Chile.

Q. Did you hear any part of the conversation? A. I heard it, but he was speaking in Spanish, so I didn't understand it.

Q. Did there come a time thereafter, when he talked to you, when he talked to you about a delivery? A. Yes.

Q. When was that? A. That was around the first or second week in September.

—581—

Q. Where did the conversation take place? A. We was either in his car or in Carter's Corner.

Q. That is a bar—Carter's Corner? A. Yes.

Q. What did he say to you? A. He told me that he was expecting a shipment in, and he wasn't going to call me no more until the date the people was going to arrive, and when I get the telephone, just tell him "Hello" and "How do you feel?" and hang up, and get a cab and come straight on up to his house.

Q. Was there any conversation about where the people would be coming from? A. No. Well, I know where they was coming from. I know they was coming in from Chile.

Mr. Somers: Your Honor, I move to strike that out, sir.

The Court: How did you know that?

The Witness: Because from the telephone bill, that that is where he was calling the people.

The Court: How do you know that the telephone call to Chile had any connection with the package?

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The Witness: Well, he was telling me all the time that is what the call was for.

The Court: Colson was telling you that?

The Witness: Yes.

The Court: Overruled.

By Mr. Starkey:

Q. All right. Did there come a time thereafter when he did call you? A. Yes.

Q. How much later? A. Well, about the last part of September.

Q. And what did he say when he called you? A. You mean when he called me?

Q. Yes. A. He said, "How do you feel?"

And I said, "How is everything?"

He said, "Okay."

So I hung up the telephone and took a cab on up to his house.

Q. Where did he call you? Where were you at that time? A. I was in Carter's.

—583—

Q. When you got up to Jesse Colson's apartment, what did you see? A. When I got up there, me and him was in the house by ourselves, and he was looking out the side window, he was trying to see which way the people were going to come from.

Q. And what happened after that? A. About five minutes later, Jesse went outside for something, and he went outside and he came back in the house and he said, "This is sure is a foxy old lady. She is sitting out there on the benches with the other people," and he went over and told her to come on into the house, everything was all right.

Q. And what did you then see? A. She had a large bag, and her and Jesse was talking in Spanish; and then she started to bringing these packages out and giving them to Jesse. It was cellophane bags, and she was giving them to Jesse, and Jesse was giving them to me, and he told me to go into a small room, and we had two large jars, and I started cutting the tops off them and pouring the coke into the jars.

Q. Was there any conversation at that time? A. Yes.

—584—

When we got just about finished dumping it, so he gave me a sample and he told me to take it to Leon and tell him everything was all right.

Q. What did you do then? A. So I got the sample and I came downtown and went to 136th Street looking for Leon.

Q. Did there come a time when you found him? A. Yes.

Q. Did you have a conversation with him? A. Yes.

Q. What was said? A. I gave him the sample and told him everything was all right.

And he asked me, "How much?"

I told him I didn't know exactly how much it was but it was a lot. I said that he could get anything that he wanted.

Q. Was there any further conversation? A. Yes. He told me to come by and see him the following night.

Q. Did you do so? A. Yes, I did.

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Q. Where? A. 136th Street.

Q. Did you have a conversation on that occasion? A. I asked him, "How is everything?"

And he told me that he wasn't quite ready yet, that he wanted to see Jesse and talk about the price.

Q. What did you do then? A. I went back and told Jesse to get in contact with him.

Q. Did there come a time when you talked to Jesse about whether or not he had? A. Yes.

Q. When did you talk to him about it? A. It was a couple of days, three or four days, after the shipment arrived.

Q. And what did Jesse say to you and you to him at that time? A. Jesse told me that he had talked to Leon and he had arranged the price with him; he was going to get a kilo of cocaine the following night.

Q. The following night? A. Yes.

Q. Was there any further conversation at that time? A.

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No. He told me he would come downtown and see me the

next day, and he would get together on a meeting place, where he was going to meet me.

Q. Did there come a time when delivery was made, if you know? A. Yes.

Q. When did that happen? A. That was about the fifth or sixth night after it arrived.

Q. Where was delivery made? A. 136th Street.

Q. Were you there at that time? A. Yes.

Q. Where did you begin from, or where did you start from on that occasion? A. Up in Jesse Colson's house on 225th Street.

Q. You went there? A. Yes.

Q. And you saw Jesse? A. Yes.

Q. Did you have a conversation with him? A. He was just finished measuring out the coke from one jar to a smaller jar.

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Mr. Somers: I will have to object to the descriptive work "coke" because there has been no testimony at all as to what the stuff actually was. He is referring to this as cocaine, but the record is absolutely barren of any evidence that this was in fact cocaine.

The Court: Do you know cocaine when you see it?

The Witness: Well, I could taste it. I can taste it, but you could get five or six substances in the form of a powder.

The Court: Anyway, they were referring to this as coke?

The Witness: Yes.

The Court: That is the word they used in connection with it?

The Witness: Yes.

The Court: Objection overruled.

By Mr. Starkey:

Q. Did you ever take a freeze from this? A. Yes.

Q. Will you tell the Court and jury what a "freeze" is? A. A "freeze" is similar to a test. You could freeze your

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gums with it, and the length of time that it stays froze, it gives you an idea of about what kind of quality it is, what kind of percent it is. It is similar.

Q. When you say "freeze," will you tell what you mean by the sensation? A. You get a cold feeling here. In other words, your lips would be numb and your gums would be numb.

Q. And you did test this—

Mr. Carluccio: Objection. There is no testimony that he took a freeze.

Mr. Starkey: That is what I am asking the witness.

Mr. Carluccio: It is a leading question.

The Court: I think the witness already testified that he took a freeze.

Mr. Carluccio: He said, "I could have taken it."

The Court: On this particular shipment, did you take a freeze?

The Witness: Yes.

The Court: I think he already testified to this.

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All right. Take the witness.

By Mr. Starkey:

Q. Now, he was parceling the package out and had just finished doing so when you arrived, you said? A. Yes, he was just finished.

Q. What did you do then? A. So he taped the package up, he taped the jar up, and he put it in a brown bag, came out and got in his car, and came down to '36th Street and Seventh Avenue, got out, parked the car and walked down the middle of the block, right in front of the club.

Q. What club is that? A. That is—it's a club there. It is a skin joint and it's a club.

Mr. Pogoda: I didn't hear that.

Mr. Starkey: A skin joint.

The Court: Do you want to explain that?

The Witness: That is a place where they play cards, skin. It's a game.

Q. What happened then when you arrived there? A. Well, me and Jesse, we was walking down the street, I had the package in my hand, we was walking down '36th Street—that is 136th Street. We saw Leon parked in the

car, went over to the car, and Jesse said, "Everything is all right."

Leon asked him, he said, "Do you have the package?"

He said, "Yes, the Schoolboy got it."

He told me, "Give it to Mersh."

Q. "Give it to Mersh"? A. Yes.

The Court: Who is Mersh?

The Witness: He is a fellow who was around the block there.

The Court: Who told you to give it to Mersh?
The Witness: Leon.

By Mr. Starkey:

Q. And what did you do then? A. I gave the package to Mersh and told Jesse I would see him a little later and kept walking.

I walked on back to Carter's Bar. He told me he would pick me up there.

Q. Did you see where he and Leon went? A. No.

Q. Now, did there come a time when you saw Jesse

again? A. Yes.

Q. Did you have a conversation with him? A. He picked me up in the bar and—that was in Carter's Bar, 139th Street and Seventh Avenue—about, I would say, 20 or 30 minutes later.

Q. Did you have a conversation with him? A. Yes. He told me he got the payoff.

Q. What happened after that? A. We went up to his house and we was counting the money.

Q. What money is that? A. The money what he got from Leon, what he told me.

Q. Do you know what the amount was? A. I don't know. I thought it was $14,000. I am not quite sure of the amount because I was putting the hundreds and fifties and twenties and the tens together, and Jesse was counting the hundreds.

Q. Do you know whether or not Jesse said anything about the amount? A. Jesse later on—me and Jesse had a conversation. He told me it was $12,000.

Q. $12,000? A. Yes.

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Q. Did there come a time thereafter when you again talked to Jesse about a delivery?

Mr. Carluccio: Your Honor, on that last incident, was a date and month or year fixed?

Mr. Starkey: The end of September, the witness testified.

Mr. Carluccio: September of '58?

The Court: When did this happen, this last kilo deal?

The Witness: It was in September, 1958.

The Court: September, 1958?

The Witness: Yes.

The Court: All right. Take the witness.

By Mr. Starkey:

Q. Now, did there come a time thereafter when you again talked to Jesse about a delivery? A. Yes.

Q. When did you have the conversation and where? A. It was in his ear, and he told me that—

The Court: When?

The Witness: When?

The Court: Yes.

The Witness: It was in August, the following month.

Q. The following what? A. It was in August.

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The Court: This was before?

The Witness: No, this was after September. It was in August.

The Court: What month comes after September?
The Witness: August—no, October, I am sorry.

By Mr. Starkey:

Q. What did he say to you? A. He told me that he was expecting another shipment in, and he told me just to repeat, do the same thing what I did before, when he makes the call, and when he makes the call, just say, "Hello. How do you feel?" and come on up to his house.

Q. And did there come a time thereafter when he made the call and you went up to his house? A. Yes.

Q. What happened when you arrived there? A. When I arrived there there wasn't nobody there but Jesse. And I was in the apartment about five or 10 minutes and there was a knock on the door, and Jesse let a man and a woman in.

Q. Did you recognize either of them? A. Yes. I recog-

nized the woman.

Q. Where had you seen her before? A. Because she brought the stuff in before with another elderly lady. She was with the lady.

Q. She was one of the two women that arrived with the first shipment? A. Yes.

Q. Incidentally, did you hear the language that she spoke? A. Yes, they spoke in Spanish.

Q. What happened when the man and woman entered the apartment? A Jesse was talking to them in Spanish, and the lady had a large bag, and she started out giving Jesse the bags, and he was giving them to me and I was taking them in the back and putting them in a large jar.

Q. Did you have any conversation with Jesse at that time? A. As we was putting them in the jar, Jesse was

taking the bag and he was freezing the stuff, you know, and he said, "Look at all this coke."

Q. Was there any other conversation? A. And when we got it jarred up, he gave me a sample and he told me

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to take it to Leon and tell him that everything was all right.

Q. Did you see Leon thereafter? A. Yes.

Q. Where? A. 136th Street.

Q. When? A. It was about the last of October.

Q. Now, did you have a conversation with him at that time? A. Yes. I gave him the sample and told him that Jesse said that everything was all right.

Q. And what did he say, if anything? A. He told me he would see me later because he had to get some money up.

Q. And did there come a time when you saw him again? A. Yes; I think it was a couple of nights after.

Q. Where? A. At 136th Street.

Q. What was the conversation? A. He told me that he was still waiting because he hadn't got the money up yet and he told me to tell Jesse that he wanted to see him,

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to come by; he wanted to talk about the price with him.

Q. And did you have any further conversation with him? A. With who?

Q. With Leon. A. No, not at that time.

Q. Did there come a time thereafter when you talked to either Jesse or Leon about the delivery? A. It was about a couple of days after Jesse told me that he was going to come downtown and he was going to make a move the next night.

I told him, "Okay," I would be around the bar.

And he came and got me that afternoon, and we was together, we was riding around, and he told me that he was going to take Leon a kilo tonight.

Q. Did you see Jesse that night? A. Yes.

Q. Where did you see him? A. We didn't leave each other. After we was riding around, we didn't leave each other. We went to stash—

The Court: Tell the jury what "stash" is.

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The Witness: "Stash" is the place where we used to have the cocaine at.

By Mr. Starkey:

Q. Where was that? A. It's on Park Avenue.

Q. And what happened then? A. We went up there and measured the coke out, measured kilos, spoonweight, and then me and Jesse left and came to '36th Street and Lenox Avenue.

Q. And what did you see there? A. Jesse told me to wait across the Avenue in front of the Harlem Hospital, that he was going into the block to see if he could see Leon and, when he give me the signal like this, to come on across the street.

So he was in the block about five or 10 minutes, and he gave me the wave to come across the street, and as I got across the street I saw Leon coming from down '36th Street, and him and Colson—and Jesse and Leon was talking, and as I got near Jesse, he told me to give him the jar, so I gave the jar to Leon.

Q. You gave the jar to Jesse and he gave it to Leon? A. Yes.

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Q. What happened then? A. And Leon told Jesse, he said he had to go some place to get the money.

Q. Do you know where they went? A. There was the three of us.

Q. You went too? A. Yes.

Q. Where was it? A. It was down near 122nd Street; it was on Morningside or Manhattan Avenue.

Q. What happened there? A. Leon got out and went into the building, and he was in there about 15 or 20 minutes, and he came out with two brown bags, and he gave them to Jesse and told him that all the money was there.

Q. What happened after that? A. We came back up Seventh Avenue and put Leon out at 136th Street and went up to Jesse's house with these two bags of money and we starting counting the money out.

Q. How much was there? A. Well, I thought it was $14,000, but Jesse told me after that it was only $12,000.

Q. Now, what was the appearance of this substance that

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was delivered? A. It was the same as it was before.

Q. Did you test any of it? A. Yes.

Q. Did it numb your gums? A. Well, the freeze on that lot wasn't as strong as the other.

Q. Did you ever have a conversation thereafter with Jesse about the quality? A. Yes.

Q. How long afterwards? A. It was about a week, a couple of weeks.

Q. What did you say and what did he say? A. He told me, he said, "Everybody is complaining." He said that the coke that they sent in wasn't nothing but garbage, and he said he was going to send down and ask them to send him some of his money or send him some more coke in.

Q. Did he say who had complained? A. He told me everybody had complained.

Q. Did he say whether or not—did anyone complain to you? A. No.

Q. Did he say whether or not anyone had said it was

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not cocaine? A. No.

Q. Well, no what? A. It was coke. Nobody didn't say it wasn't coke, but it wasn't up to par. It wasn't pure, you know. The purity wasn't there.

The Court: We will take a five-minute recess.

(Short recess.)

Mr. Starkey: Now I ask that these pictures be marked Government's Exhibits 3, 4 and 5 for identification.

(Government's Exhibits 3, 4 and 5 marked for identification.)

By Mr. Starkey:

Q. Now, Mr. Ellis, I show you Government's Exhibit 3 for identification and ask you if you recognize the person in that picture. A. Yes.

Q. Where and when have you seen her before? A. I saw her up Jesse's house.

Q. Was she one—when was it that you saw her up there? A. This was the last of September.

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Q. What happened on that occasion? A. When she brought in the coke.

Q. And that was the first delivery? A. Yes.

Q. All right. I show you Government's Exhibit 4 for identification and ask you if you recognize her. A. Yes.

Q. Where and when have you seen her before? A. She came on the same delivery with the other lady.

Q. On that same first delivery? A. Yes.

Q. Did you see her thereafter? A. Yes.

Q. When? A. On the second delivery.

Q. She was there then, too? A. Yes.

Q. I show you Government's Exhibit 5 for identification and ask if you recognize that man? A. Yes.

Q. Where and when have you seen him before? A. Well, he came—him and this lady came together the last time

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when the shipment of coke came in.

Mr. Starkey: I will offer these in evidence.

With the Court's permission, I will proceed while counsel examine the photos.

The Court: Yes.

Mr. Pogoda: I shall object to the introduction of these photographs, if the Court please, unless these persons on the photographs are mentioned in the indictment as defendants or co-conspirators.

Mr. Starkey: If Mr. Pogoda is asking for the identity of these people, I will be happy to give him that information.

Mr. Pogoda: They are being offered so at this point they are irrelevant. We have not tied them into the case.

The Court: That is overruled. The witness testified that they are the ones who brought in the cocaine. That is overruled.

Mr. Pogoda: If they are not defendants or co-conspirators, they have no part in this case.

The Court: Well, it is not necessary that they be named, but if you want the names, I think counsel

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will give you the names, or perhaps he will develop that later. But the names do not have to appear in the indictment itself. The indictment names certain people, and then names "other persons to the grand jury unknown"; at least usually they do. But in any event perhaps the identity of these particular persons will be disclosed.

This witness says that they are the people who brought the cocaine in.

Mr. Starkey: If counsel will accept my representation in this area, I will be happy to give him that.

The Court: I don't think they are interested in your representations on this.

Mr. Starkey: All right, your Honor.

By Mr. Starkey:

Q. Did you receive any money from Colson as a result of your assistance on these two deliveries? A. Yes.

Q. How much did you receive? A. I received 10 per cent.

Q. And how much was that? A. I got, on the first delivery, about $700. I owed Jesse money because he loaned

—604—

me $300 to go home when my mother died, and I owed him money, bar bills and things like that, money that I got from him. He always kept it down in a little black book.

Q. So you received the difference between what you owed him and 10 per cent of the price of the transaction? A. Yes.

Q. How much did you receive on the second occasion? A. I think I got approximately $1,100. I'm not quite sure, but it was in that range. I owed him some more money.

Mr. Starkey: Your Honor, I began questioning the witness after the recess without asking that the last question prior to the recess be reread.

The Court: Those notes are being transcribed.

By Mr. Starkey:

Q. After you returned to the apartment with money following the second delivery to Leon— A. Yes.

Q. —you said you and Jesse counted the money. A.

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Me and Jesse and the man on that picture was counting the money.

Q. The man in the picture, Government's Exhibit 5 for identification, or Government's Exhibit 5 now in evidence? A. Yes.

Q. What happened after that? A. After we got finished counting the money?

Q. Yes. A. After we got finished counting the money, Jesse was—he was counting out some money for the man and gave it to him. I don't know how much the money was. And the man asked Jesse to take him downtown, and we came out of Jesse's house and got in his car and we came downtown, and he left him off around 33rd or 32nd Street, around Broadway some place, around there, in that area.

Q. Do you know how much money Jesse Colson paid then? A. No, I don't.

Q. Did you have any conversation thereafter with Jesse Colson about the quality of the cocaine? A. Yes.

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Q. What was said? A. He told me that he was getting complaints by everybody that got the coke, and a lot of people was giving it back to him, and he said it wasn't nothing but garbage, you know. And he made a call to Chile, so he told me, and he told them to send him part of his money back or send him some more cocaine that is pure, because he is not going to lose all of his money on this deal.

Q. Do you know if he ever received an answer? A. Yes, he received an answer, and he got an answer that he should get some carbonate of soda.

Q. Bicarbonate of soda? A. Yes. And mix it, and it would bring the coke up to par.

Mr. Carluccio: I object. I don't know how he knew that he received an answer. He didn't read any Spanish letters or anything like that.

The Court: How did you know that?

The Witness: Jesse told me that the telephone call—that Jesse called down there, and he got it on the phone, and he told me.

The Court: Jesse told you?

The Witness: Yes. And I went and got the bicarbonate of soda from the drug store.

By Mr. Starkey:

Q. What did you do with it? A. We went over to where we had the cocaine stashed at, and we took an ounce and mixed a spoon of bicarbonate of soda in it and mixed it up.

Q. What happened after that? A. So we gave it a water test.

Q. A water test? A. Yes.

Q. What kind of a test is a water test? A. A water test, you get a glass of water, and take a pinch of cocaine and

let it fall in the water, and if the water stays clear, you got a good percentage of cocaine; and if it becomes cloudy, you got a bad percentage of cocaine.

Q. What happened with the water test on this occasion? A. Well, the water was cloudy and there was a film on the top, and Jesse said, "This still ain't no good. It's still just garbage. Get in contact with him again and tell him to send some money or more coke."

Q. Now do you know where the defendant Thorn was living at this time? A. Who?

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Q. Icky Thorn. A. Yes.

Q. Where? A. He was living in a hotel. I don't know exactly the street of the hotel, but it's in the area of 115th or 117th Street, up near Amsterdam, between Amsterdam and the park there.

Q. When did you next see the defendant Thorn, if you did see him, after this second large delivery? A. Well, I was over there, over to the hotel, say five or six times, or more.

Q. During what period? A. It was in October and November.

The Court: What year?
The Witness: '58.

Q. With whom did you go there, if anyone, during this period? A. I went there with Jesse.

Q. Did you ever hear any conversation between Jesse Colson and Icky Thorn? A. Yes.

Q. Will you tell the Court and jury what you heard?

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A. Well, Jesse asked Icky, "How is business going?"

Icky told him, he said, "The coke is going very slow, you know."

And Jesse told him, he said, "I've been going too slow, and I will have to take it back and sell it outright."

Icky told him, he said, "I am doing the best I can, you know." He said, "There's a lot of coke in town, and I have some big customers pretty soon and it will move then."

Q. About how many times did you hear such a conversation? A. Twice. I think it was about twice.

Q. Do you know whether or not Jesse received any money? A. Yes, he received some money both those times because he had a pad, and he had Icky's name on it. I don't know how much money it was, but Jesse always deducted what Icky gave him.

Q. Icky gave him money? A. Yes.

Q. On how many occasions did you see that? A. It was twice.

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Q. Did you ever have any conversation with Jesse about what his arrangement was with Icky? A. Yes.

Q. What did he tell you? A. He told me "I was giving Icky cocaine on consignment."

Q. Now, did there come a time when you again saw the defendant Leon Aiken? A. Yes.

Q. When was that? A. Jesse told me—I think it was the last of October or the first of November, somewhere along that time—he told me, he said, "Go get Leon tonight at about 8 or 9 o'clock and bring him up to the hotel."

Q. When did this occur? A. About the last of October or early November. It was in that area of time. I don't know exactly what special date it was.

Q. And did you do so? A. Yes.

Q. You saw the defendant Leon Aiken? A. Yes.

Q. You saw him? A. Yes.

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Q. Where did you see him? A. I saw him at 136th Street, and I told him what Jesse said. And he asked me where Jesse was. I told him he was up to the hotel. So he said, "Okay."

So we got in a cab and went on up to the hotel. And as we was going up the elevator, Leon said, "Man, you mean your man is here?" He said, "Nothing hangs out here but a bunch of junkies. He should be scared of this place."

Mr. Pogoda: May we have the name of this hotel?

The Court: Can you give us the name of the hotel?

The Witness: No, I am not sure about the name, but I know specifically where it is.

The Court: Where is it?

The Witness: I don't know exactly the street, but I could go to it.

The Court: Just tell us as best you know where it is.

The Witness: It's, I think, between—there is the park there. I think the park is Mount Morris Park. I don't know exactly what the name of the park is,

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but it's right off the park. I think it's between Amsterdam and this park, and it's in the area of 115th Street and 119th Street. It's in that area.

The Court: And you say it is a hotel?

The Witness: Yes.

The Court: And you don't know the name of it?

The Witness: No; right offhand, no, your Honor.

By Mr. Starkey:

Q. When were you last there? A. I don't remember the last time I was there specifically.

Q. Well, does it refresh your recollection if I ask you whether you were there with Agent Murphy? A. Yes, sir. I was there, I think it was, last week, one night, with Agent Murphy. That was the last time I was there specifically.

Q. Now, the defendant Leon Aiken said that Colson should be afraid of that hotel? A. Yes.

Q. Was there any further conversation? A. Yes. We went on up to Icky's room, and Jesse and Leon was talking.

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And I think I went next door, there was a girl there that I was playing around with.

Mr. Somers: I can't hear this.

A. I said I went over to the next door, one of the little rooms there in the hotel, and there was a girl, a fat girl there, I used to tease around with every time I go up there with Jesse.

Q. Well, who was in the room when you left? A. Leon and Jesse.

Q. Did you see anything before you left? A. No, not before I left.

Q. What happened when you returned? A. When I came back in the room Jesse had a jar on the table and he was wrapping it with tape, and he told me he wanted me to take this down to '36th Street with Leon.

Q. Do you know what was in the jar? A. Not exactly, I didn't know what it was.

Q. What did it look like? A. It was a white substance.

Q. A white substance? A. Yes.

Q. Well, beyond that, can you describe it any more

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closely? A. Well, it was a jar, a small jar about this high, and I would say about this wide, and I put it in a bag and took it down to 136th Street.

Q. Can you, besides being a white substance, tell the Court and jury what the texture was or anything more about its appearance? A. I could say what my idea that it was—

The Court: What did it look like?

The Witness: It looked like a white substance, the same thing that I had been handling all the time.

Q. The same appearance as the other two kilos? A. Yes.

Q. But no one specifically mentioned what was in the jar on this occasion? A. No.

Q. And you carried the jar with you? A. Yes.

Q. Where to? A. 136th Street.

Q. What did you do with it there? A. I gave it to a fellow that we call Mersh, who was standing up against the curb.

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Q. Who told you to give it to Mersh? A. Leon.

Q. Did you receive any money for this? A. No.

Mr. Starkey: If I can have the Court's indulgence for one moment.

The Court: Yes.

(Pause.)

Mr. Starkey: No further questions, your Honor.

Leon Ellis—for Government—Cross

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New York, June 21, 1961,
10:30 a.m.

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Mr. Starkey: I now call Leon Ellis for cross-examination.

LEON ELLIS recalled.

The Court: You have been sworn and you are under the same oath as you took yesterday.

Mr. Pogoda: I wonder, if the Court please, might we have the recess so that there won't be any interruption in the cross-examination.

The Court: All right, we will take a five-minute recess.

(Recess.)

(Jury present.)

Cross Examination by Mr. Carluccio:

Q. Mr. Ellis, what is your first name? A. Leon.
Q. Leon Ellis? A. Yes, sir.
Q. Mr. Ellis, you have a record, a criminal record?

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Mr. Starkey: Objection. This was brought out on direct, your Honor. I think there is no need to belabor it.

The Court: I will let him say it again. I would appreciate it if you would speed this up a bit. Tell him your record.

A. I was convicted on a disorderly conduct charge in '51, and again in '60 for numbers, for policy.

Q. That is all. A. Yes.

Q. And during the transactions you testified to on your direct examination how much would you approximate, how much money did you make in the sale and distribution of the items you described? A. How much I would approximate it?

Q. In total. A. I would say around about twenty two or twenty five hundred.

Q. Are you sure it wasn't more? A. Maybe it was more or maybe it was less.

Q. Would it be more around four to five thousand dollars? A. I wouldn't know.

Q. What do you do for a living? A. Orthopedic me-

chanic.

Q. What is an orthopedic mechanic? A. Well, we make shoes and arch supports, arm limbs, braces.

Q. It is spelled o-r-t-h-o-p-e-d-i-c? A. O-r-t-h-o-p-e-d-i-c.

Q. And for whom were you employed? A. Apex Foot and Health Products.

Q. How long have you been so employed? A. Approximately 11 years.

Q. What hours a day do you work? A. What hours a day I work?

Q. Yes. A. From 8:30 in the morning until 5 after 5 in the afternoon.

Q. How many days a week? A. Five days a week.

Q. And when did you stop working for this company? A. I got a leave of absence in July or August of '56.

Q. July or August of '56? A. Yes.

Q. That is when you stopped? A. I got a leave of absence to help my godmother.

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Q. So you were an orthopedic mechanic for ten years up to '56? A. Yes.

Q. And then you stopped and got a leave of absence? A. That's right.

Q. And you still are on a leave of absence? A. No.

Q. What are you doing now? A. I am now employed by Apex and I returned September 6th of last year.

Q. September 6th? A. I think September 6th or around in that part of it.

Q. So from July '56 to 9, '60, you were on leave of absence, isn't that so? A. Would you mind repeating that again?

Q. I am sorry. I might have made a mistake.

The Court: You were not in this orthopedic business from '56 to '60, is that right, you were on leave of absence?

The Witness: That's right.

Q. And you were employed during that time, you say, with your godmother? A. I wasn't employed. I would go

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in the store and help her out, in the cleaning store.

Q. You were not employed? A. No.

Q. How often would you go in the store? A. Every day I would go in the store for a period of time.

Q. How many days a week? A. Well, I couldn't say exact how many days a week I was going to the store. I would be in the store just about every day.

Q. Well, how many days is the store open? It's open Saturdays, isn't it? A. Yes.

Q. So it would be six days a week? A. Yes, I would say six days a week.

Q. And how many hours a day? A. I was in and out of the store. It wasn't no hours. I was in and out of the store. If something needed to be done while I was there I did it.

Q. Well, when you say something had to be done while you were there, what did you do there? A. What did I do?

Q. Were you a presser? A. No. I used to take orders.

Q. Take orders? What else? You mean when someone brought a garment in you would fill out the slip? A. Yes.

Q. Anything else? A. And I used to go around picking up orders from different people.

Q. You picked up orders? A. Yes.

Q. Anything else? A. Well, just general things around the cleaners, you know.

Q. And when you took the orders, and you wrote out the slip, did you also sign your name to the slip? A. No.

Q. Or put a number? A. No.

Q. You were going to say something, what was it? A. Well, let me tell you this, just like, these records, what was taken, at that time they were all destroyed.

Q. I didn't ask you whether the records were destroyed. I asked you when you made the slips out did you put your name down or was there some indication that you were the one who took the slip? A. No.

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Q. Would you write it out? A. Yes.

Q. Would you write the slip out? A. Yes.

Q. Would you be able to recognize your own handwriting? A. Well, yes.

Q. Where is that store? A. The store was 2363 Seventh Avenue.

Q. What is the trade name or the name it goes under? A. It was Eva's Laundry but it was under another name and I was working—helping out in the store. It was Pitts, but I was never writing out the orders there.

Q. I don't want to confuse you Mr. Ellis. I want to ask my question again so that you can give me that answer. What name was the store under? A. Let me see. I think I have a card here. Luxor Cleaners.

Q. May I see the card so that I can get the spelling? A. Yes.

Q. Is that establishment still in business? A. Would you mind repeating that?

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Q. Is that store still in business? A. No.

Q. When did it terminate its business? A. Last year about in October or November.

Q. And this E. Barnet, Manager— A. That is my godmother.

Q. And she ran the store and managed the store? A. Yes.

Q. Where does she reside at present? A. She is up in the country somewhere working. I don't know exact where she is working. She is working up in the mountains. I don't know exact where it is.

Q. Does she have a New York address? A. Yes.

Q. What is the New York address? A. 313 West 138th Street: no, it's 139th Street.

Q. What does E stand for? A. Eva.

Q. And you worked off and on and your testimony is that you worked off and on between July, '56, to September, 1960, in the cleaner? A. Yes.

Q. Did you have any other jobs? A. Yes. I wouldn't

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call it a job but I was taking numbers.

Q. All right. That was your other source of income? A. Yes.

Q. Taking numbers? A. Yes.

Q. When were you doing this, during what time? A. Around about '57 until I went back to work.

Q. Until 1960? A. Yes.

Q. Did you have any other sources of income? A. No.

Q. How much did you make taking numbers? A. How much did I make?

Q. Yes. A. I wouldn't know.

Q. How much did you make a day? A. You don't get profit taking numbers by day. You could take $5 worth of business a day and you could take $20 worth of business or a hundred dollars. I was a man that takes about ten or fifteen dollars a day business. That was the best I could do.

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Q. And were you paid by your godmother? A. No. I could always get a few dollars out of the business, you know; go in the drawer and take a couple of dollars out.

Q. Was this with her permission? A. Without her permission or with her permission. I was looking at the store while she was out.

Q. Any other source of income? A. (No response.)

Q. The numbers, you said, you took each day, did you take that six or seven days a week? A. Six days a week.

The Court: Are you still trying this case or are you on another case?

Mr. Carluccio: No, I am on this case.

The Court: I just thought you had something else in mind. The jury would like to get back on this case, if you don't mind.

Mr. Carluccio: No further questions.

Cross Examination by Mr. Archer:

Q. Mr. Ellis, when for the first time did you meet Jesse Colson? A. When was the first time I met him?

Q. Yes. A. Actually in talking to him or the first time

I saw him?

Q. That you became acquainted with him. A. It was in '57.

Q. In 1957? A. Yes.

Q. Were you working at that time? A. Well, I wouldn't say I was working. I was with my uncle. I wouldn't consider that a job but I was helping my godmother in the store.

Q. Was this your godmother or your uncle? A. My godmother.

Q. Are you married? A. Yes.

Q. Do you have a wife? A. Yes.

Q. Children? A. Yes.

Q. When were you married? A. Where?

Q. When. A. When was I married?

Q. Yes.

Mr. Starkey: Objection.

The Court: Is this important to this case?

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Mr. Archer: Yes, your Honor, I want to develop a point with reference to the occupation and to tie up the occupation and the support of this family with this case.

The Court: I will overrule the objection but I think it would be well if we get on with the cross-examination with reference to this case if you want to.

Mr. Archer: I will get into the meat of it, your Honor.

Q. What date were you married? A. June 8, 1949.

Q. And during the time that you were on leave from June or July, 1956, were you living with your wife? A. No. Me and my wife have a legal separation.

Q. Tell me, Mr. Ellis, when for the first time did you meet Icky Thorn? A. I can't memorize the date right at the present but I know the first time that I met him, the first time that I met him.

Q. Let us have the approximate date and time and place. A. I don't know exact the date.

Q. You don't know? A. No.

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Q. Yet you recall all this testimony yesterday.

Mr. Starkey: Objection. Counsel is arguing with the witness.

The Court: I sustain the objection.

Q. Tell me, when were you first arrested in this case? A. I don't know the date.

Q. Have you been arrested in this case? A. Yes.

Q. When? A. I don't remember the date.

The Court: When you are answering questions try to give counsel your best recollection, the year or the month if you can do it. Just give him your best recollection.

A. I would say about six or seven weeks ago.

Q. Six to seven weeks ago? A. Yes, approximately that. That is the best that I can remember.

Q. Who arrested you? A. Who actually arrested me?

Q. Yes. A. I don't know. It was three or four agents.

Q. And after the three or four agents arrested you or

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took you into custody where did you go? A. I went to the House of Detention on West Street.

Q. They took you to the House of Detention at West Street? A. Yes, the federal prison downtown.

Q. I don't want you to argue with me.

The Court: Just a minute. Don't lecture the witness. Just ask questions.

Q. When you were first arrested where were you taken? A. To West Street.

Q. To West Street? A. Yes.

Q. Were you taken subsequently to Mr. Murphy's office? A. No. What do you mean?

Q. Subsequently? Afterwards. A. Yes.

Q. What time? What date? A. The next day, the following day after I was arrested.

Q. Were you, at the time of your arrest, or at the time

you were taken into custody by the Customs, told the rea-

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son for your arrest? A. Yes.

Q. What were you told? A. Violating the Narcotic Act.

Q. And you were brought to Mr. Starkey's or Mr. Murphy's office the following day? A. Mr. Starkey's office.

Q. For what length of time were you interrogated by Mr. Starkey? A. Well, what do you mean by interrogation?

Q. Did you have a conversation with Mr. Starkey? A. Yes.

Q. How long did the conversation last? A. I would say about an hour.

Q. One hour? A. About.

Q. Did you subsequently have further conversations with Mr. Starkey? A. Yes.

Q. Were you served, thereafter, with a complaint? A. I don't understand that.

Q. Were you served with a paper in the Commissioner's office, or taken to the Commissioner's office?

The Court: Were you served with any papers at all in this case, did anybody serve any papers on you.

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A. I think so. I think so.

Q. Well, you were only arrested six or seven weeks ago. Do you know for a fact whether you were served with any papers by any person in this room? A. Well, I was in front of a judge and he read what I was charged with.

Q. And did you have counsel at the time? Did you have a lawyer? A. No.

Q. Were you apprised of the fact that you had an opportunity to retain an attorney? A. I didn't understand.

Leon Ellis—for Government—Cross

Q. Were you told that you could have had an attorney to represent you? A. Yes.

Q. Did you try to get an attorney to represent you? A. No.

Q. Were you then placed on bail, was a bail bond set for you in this proceeding before the judge? A. No.

Q. What happened? Let us know what happened there when you were taken before the judge. A. I was let out on my own power or something like that.

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Q. You were let out on your own custody?

The Court: Recognizance, is that the word?

A. Recognizance.

The Court: In other words, you mean that you didn't have to bring in a bondsman.

The Witness: That's right.

The Court: Did you sign something yourself to get out? Did you sign a bond yourself?

The Witness: No, sir.

The Court: All right.

Mr. Starkey: Your Honor, I think it should be called to counsel's attention that this was a commissioner and not a District Court judge.

Mr. Archer: Well, he said a judge.

The Court: I think the jury understands that this is some sort of committing magistrate.

Q. And at the time you were before the commissioner was the complaint read to you with the charges, if any, against you? A. Yes.

Q. Were you given a copy of this complaint? A. No.

Mr. Archer: At this time, your Honor, I would request that the government produce a copy of the complaint served on this witness.

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The Court: Well, sir, the subpoena power of the court is available to you and if you want a copy of the subpoena just subpoena it and I will see that you get it.

Q. And after you appeared before the commissioner you were set out without bail, is that so? A. Yes, sir.

Q. Was there any recommendation made by the U. S. Attorney in your presence at the time with reference to bail? A. I didn't get that. I didn't understand the question.

Q. You don't seem to understand anything.

Mr. Starkey: Objection.

The Court: Just a minute. Don't argue with the witness. The witness may not be as well educated as you are. Speak in words of single syllables as much as possible.

Q. At the time that you were before the commissioner was any recommendation made with reference to bail by the U. S. Attorney? A. I don't remember.

Q. You don't remember that? A. No.

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Q. How many times after you were released on bail did you visit either with Mr. Starkey or Mr. Murphy? A. I would say eight or nine times.

Q. And at each time did you have conversations with either Mr. Murphy or Mr. Starkey? A. Yes.

Q. When you had the conversations with Mr. Starkey were they in question and answer form? A. Yes.

Q. And he asked you certain questions and you gave him certain answers? A. Yes.

Q. Do you recall a statement made by you to Mr. Starkey in question and answer form dated April 25, 1961? A. Do I remember any?

Q. No, do you recall having made a statement to Mr. Starkey in question and answer form dated April 25, 1961.

Mr. Archer: I think it is Government's Exhibit 4.

The Court: Why don't you just show him the statement. It is Court Exhibit No. 11 for identification.

Mr. Archer: All right, your Honor.

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A. Yes.

Q. Now this statement was reduced to writing, is that so? A. It was reduced to what?

Q. Well, this is the statement that you made to Mr. Starkey? A. Yes.

Q. And these are all the questions asked of you by Mr. Starkey and all the answers given by you to Mr. Starkey? A. Yes.

Q. And this statement was read to you afterwards, was it, at any time? A. I think so. I don't remember.

Q. You think so? A. Yes.

Q. Then you were arrested on April 24, 1961, am I correct? A. I don't know exact what day I was arrested.

Q. Well, this was taken one day after you were arrested, am I not right? A. Well, I don't know exact. I really don't know.

Q. When the statement was taken by Mr. Starkey did you at that time recall the entire incident and the state-

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ments that you made yesterday? A. Did I actually recall—

Q. Yes. At that time you were asked about all the related circumstances involving you in this case. A. Well, I gave my answers to the best that I could remember at the actual time that I was doing these things. In other words, I remember what I did, but the dates and the months I can remember them pretty close but I can't tell the dates and months but I actually know that I did these things.

Q. And you were asked substantially all the questions you were asked yesterday? A. I was asked what?

Q. Substantial or you were asked—the questions you were asked yesterday were they the same questions asked at the time that you made this statement? A. I don't remember.

Q. You don't recall that? A. I don't remember.

Q. I show you this statement and I ask you whether or not there is any question and answer in this statement with reference to Icky Thorn at the 94th Street address? A.

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(No response.)

Q. Mr. Ellis, you can read and write, can you not? A. Pretty fair.

Q. How far in school did you go? A. I finished grammar school.

Q. Oh, you finished grammar school? A. Yes.

Q. Then you read these statements just now, did you not? A. No, I didn't read them.

Q. You didn't read them.

Just read them and refresh your recollection as to whether or not there is any statement in here. A. Do you want me to read everything?

Q. Yes.

(A pause.)

Q. Then, Mr. Ellis, you have read Government's Exhibit 11, or Court Exhibit 11 for identification, have you not? A. Yes.

Q. At the time you made these statements were the incidents in your connection in this case clear to you? A. You mean what I was charged with?

Q. Yes, what you were charged with and what you were doing.

Mr. Starkey: I will object there, your Honor. I don't think that question is clear. It is not clear to me. I know that.

The Court: Rephrase your question.

In other words, what he wants to know is at the time you were arrested and at the time that you gave the statement that you just read, did you remember the incidents that took place which you described yesterday? I think that is the question.

Mr. Archer: That's correct.

A. I couldn't remember everything as it happened, but, you know, I remember as close as possible at that time.

Q. Yet you did not tell Mr. Starkey, in your statement, anything with reference to Icky Thorn at the 94th Street address.

Mr. Starkey: Objection.

The Court: What is the basis of the objection?

Mr. Starkey: First of all, your Honor, the argumentative form of the question, and the witness, at least counsel has not asked the witness whether or not he was asked about it. He has brought it in that

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it was in question and answer form.

The Court: Well, in any event, were you asked anything about Icky Thorn in that statement?

The Witness: No.

The Court: Did you answer anything about Icky Thorn in that statement?

The Witness: No.

The Court: All right, take the witness.

Q. Now, Mr. Ellis, you stated that you saw Mr. Starkey about eight or nine times prior to your coming here to testify. Did you discuss this case eight or nine times with Mr. Starkey? A. He was asking me a few questions about different things and I was telling him the best I could.

Q. And each time you came here were new questions asked of you and new statements given by you to Mr. Starkey? A. Well, yes.

Q. And then you gave to Mr. Starkey other statements other than these that you read at different times?

Mr. Starkey: Your Honor, I will object because I think on the one hand he asked about questions and answers that were taken down, a stenographic statement and now he is switching over, insofar as

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taking an oral statement is concerned. I don't think the question is clear enough.

The Court: Rephrase the question.

What he wants to know is this, you talked to Mr. Starkey several times about this, didn't you?

The Witness: Yes.

The Court: Now one time at least you had a stenographer present, and she produced this typewritten statement?

The Witness: Yes, sir.

The Court: Did you see the typewritten statement after she typed it?

The Witness: Yes.

The Court: You did see it?

The Witness: Yes.

The Court: Now, then, on the other occasions when you saw Mr. Starkey was there a stenographer present?

The Witness: No.

The Court: Now on those other occasions he wants to know what Mr. Starkey was doing while he was questioning you.

The Witness: Well, he was asking me about different people, and I revealed what I did with that person.

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The Court: Did you ever see any other kind of statement that resulted from Mr. Starkey asking you questions other than this statement that has just been shown to you?

The Witness: (No response.)

The Court: In other words, was any other statement prepared from an interview you had with Mr. Starkey other than the statement that you just saw?

The Witness: No.

The Court: All right, take the witness.

Q. When for the first time did you discuss Icky Thorn and your visit to a 94th Street address with Mr. Starkey? A. I don't know what date it was.

Q. Did you for a fact go to 94th Street at any time with Jesse Colson as testified yesterday? A. Did I?

Q. Yes. A. Yes.

Q. When? A. The best I can remember is—

Mr. Somers: Your Honor, I respectfully wish to state that counsel did not get the complete transcript taken down by Mr. Starkey. I know it was through

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inadvertence but we didn't get it and it is very important to this issue and to the cross-examiners, and can we have two minutes while Mr. Starkey furnishes us with these additional sheets?

Mr. Starkey: Your Honor, the Court will recall that I stated that there were two stenographic statements yesterday and that I stated for the record that on the original, which is in reality only five different pages, that two copied pages were included to make the total mass seven pages and I thought defense counsel understood that, and I also said at that time that they could pull out, or the two copied pages could be pulled out of the exhibit for identification to reduce it to the five different pages.

Mr. Somers: Your Honor, this is very pertinent, as your Honor will see. We don't have it. We merely want it. That is all. We haven't got it.

The Court: Check and see if you have given it all to him.

Mr. Starkey: Your Honor, now on the record, I would like to remove two carbon copies of the first page of Court's Exhibit 11 for identification which were included in the exhibit at that time, and they may have the copy which they have requested.

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Mr. Somers: Does this now include the entire statement of this witness that was reduced to writing?

Mr. Starkey: Of course it does, your Honor. The only change in Exhibit 11 for identification, Court's Exhibit 11, has been that it's now been reduced from seven to five pages by the removal of two carbon copies of page number 1.

Mr. Somers: Except that you now also have given me the statement dated June 6th which we did not have until just now.

Mr. Starkey: Your Honor, I object to this before the jury. The total statement was marked for identification yesterday and given to counsel for examination at the close of the session.

Mr. Somers: Judge, can we approach the bench.

(Discussion at the bench off the record.)

The Court: Let's proceed. All right, take the witness, counsel.

Q. Mr. Ellis, you were questioned again on June 6, 1961, by Mr. Starkey, and Court Exhibit No. 11 is here, and you read the statement here on June 6th, did you not? A. Yes.

Q. And is there any reference to Icky Thorn in this

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statement that you read just now? A. I don't remember.

Q. Did you read it? A. I read the first page. I didn't read all the pages.

Q. The first is what I referred to. That is the only page on the questions and answers of June 6th. A. I don't see anything about Icky down there.

Q. Thank you.

And when for the first time was the name Icky Thorn brought to your attention? A. When I was down at 94th Street.

Q. When you were down where? A. 94th Street.

Q. What happened at 94th Street? Tell us. A. You want me to tell you exact what happened?

Q. Yes, tell us what happened at 94th Street. A. We went up to this apartment.

Q. Who took you up to the apartment? A. Colson, Jesse Colson.

Q. What time of the year? Give us the specific time and date. A. I can't give you the specific time.

Q. Was it the early part of the year, the summertime

or the latter part of the year? A. It was, the best I can remember, the latter part of the year.

Q. About what month, more or less, and what year? A. This was '57, November or December. That is as close as I can get to it.

Q. November or December, 1957? A. Yes, that is as close as I can get to it.

Q. November or December, 1957? A. Yes.

Q. What was the address at 94th Street? A. I don't know.

Q. Could you describe the building that you entered? A. No.

Q. Did you know for a fact that Icky Thorn was residing there? A. No.

Q. What were you told when you were taken to this apartment? A. I wasn't told anything.

Q. As to who resided there. A. Nothing.

Q. And you stated yesterday that you were taken to an

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apartment at a 94th Street address. A. Yes.

Q. Did you go into the building? A. Yes, I had to go in the building to get upstairs.

Q. And you entered an apartment? A. Yes.

Q. Was this an apartment house? A. This was an apartment building.

Q. Yes, an apartment building. A. Yes.

Q. Do you recall what apartment you entered? A. No.

Q. Did you enter the apartment? A. Did I enter the apartment?

Q. Yes. A. Yes.

Q. Was it a large apartment? A. I think it was a small apartment. I don't know direct. The furthest I got was in a room and a small kitchenette.

Q. How many rooms were there in the apartment? A. I didn't go in the rooms.

Q. Oh, you didn't go into the rooms? A. The only one

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room I went into was a small room and a little kitchenette.

Q. A small room and a little kitchenette? A. Yes.

Q. Who was there? A. I don't remember.

Q. You don't remember? A. No. There was a couple of girls and—a couple of girls.

Q. There were a couple of girls there? A. Yes.

Q. Who else? A. And me, Icky, and Colson.

Q. Did you meet Icky before this time? A. No.

Q. How did you know Icky was there? A. Because I know Icky was there. I was looking at him.

Q. Were you introduced to him? A. Yes.

Q. When were you introduced to him? A. The same night when I went up there.

Q. Was that the apartment that Icky lived in? A. I don't know whether he lived there or not.

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Q. But you said you saw Icky there. A. Yes.

Q. Did you or Jesse give any package or packages to Icky Thorn at that time? A. No.

Q. Did you have any package or packages with you at the time you entered the apartment? A. Jesse had a little black bag.

Q. Then did you not see the contents of the black bag that Jesse had? A. No.

Q. Did you see Icky with anything when you got there? Where was Icky when you got there? A. Icky opened the door.

Q. He opened the door? A. Yes.

Q. Then what happened? A. Then what happened? Jesse told Icky, he said, "This is Schoolboy." He said "This is Icky," and Jesse told Icky, he said, "Here is the man for the coke." And Icky said, "All the coke?" Jesse said "Yes."

Q. Did Jesse give—

Mr. Starkey: I don't think the witness is finished, your Honor. The question was what happened.

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The Court: Finish the answer. What else happened?

A. And Icky said, "All the coke?"

Jesse said, "Yes." He said, "I got a man that is coming over in a few minutes and I could cut the coke and you could almost double your money."

Jesse said "Yes, I didn't think about that but I got cash money now." You know. Icky said, "Well, I got a man who is coming who is a good customer. He is my man." And Jesse said "Yes. I will tell you what I will do." He said, "I will let you send half to your man, Schoolboy, and let Icky keep half for his man."

Icky went into a little dinette where there was a table and he was measuring the coke and putting it from one jar into another.

Q. At the time you spoke with Mr. Starkey did you relate this conversation to him?

Mr. Starkey: I will ask that counsel designate which conversation he is speaking of.

The Court: At any time.

Q. At any time, the conversation with reference to what you just said. A. Well, he asked me did I know Icky,

and I told him yes. And he asked me from what? And I told him how I met Icky and what took place at that time.

Q. And you recall now, and yesterday, the exact words that were said when you were there three or four years ago? A. No, not the exact words. Have you ever been in a conversation, in a slang conversation? It is just the words used.

Q. You testified yesterday that Icky Thorn was living at 115th Street, is that not so? A. Is it what?

Q. Is it correct that Icky Thorn was living at 115th Street, is that not so? A. Is it what?

Q. Is it correct that Icky Thorn was living at 115th Street?

Mr. Starkey: Again, your Honor, I am going to ask if counsel is going to characterize the witness' testimony that he give it in full, as to time and a complete question.

Q. You were asked yesterday:

"Q. Now, do you know where defendant Thorn was living at this time? A. Who?

"Q. Icky Thorn. A. Yes.

"Q. Where? A. He was living in a hotel. I don't know exact the street of the hotel but it is in the area of 115th and 116th Street near Amsterdam Avenue."

Were you asked those questions yesterday and were your answers substantially true? A. At which time are you talking about?

The Court: No. The question is this: You testified on cross here that you went to a room where Icky Thorn opened the door and you went in and this room was in an apartment building on 96th Street. Haven't you testified to that?

The Witness: 94th Street.

The Court: 94th Street. I am sorry. Now counsel read to you part of your testimony from yesterday in which you said that Icky Thorn was living at a hotel on 115th Street or around 115th Street. Now

just explain to the jury about that. In other words, explain to the jury about the two places, if you can.

The Witness: 94th Street was an apartment house, and 115th Street was in a hotel.

The Court: All right, take the witness.

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Q. Was there any lapse of time between the 94th Street incident and the 115th Street incident? A. Yes.

Q. What time elapsed? A. Well, we used to go up there in September and October.

Q. September and October? A. Yes.

Q. How many times did you have occasion to visit the 94th Street address? A. Only once.

Q. How many times did you have occasion to visit the 115th Street address? A. Oh, six or seven times more or less.

Q. Would you say then that Icky Thorn lived at 115th Street and not at 94th Street?

Mr. Starkey: Objection.

The Court: Suppose you tell us, do you know where Icky Thorn lived? Do you know whether or not he lived at 94th Street at all during this period of time?

The Witness: No, I don't.

The Court: All right.

Q. Tell me, did you know a Sylvia Ferris? A. Yes, sir.

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Q. Did you see her at 94th Street? A. No.

Q. Did you see her any place at all? A. Yes, I seen her a lot of places.

Q. Did you see her at the 115th Street address? A. Yes.

Leon Ellis—for Government—Cross

Q. Do you know whether she was living at 115th Street with Icky Thorn as husband and wife? A. I don't know whether they was living as husband and wife.

Q. Do you know whether she was living at 115th Street? A. She was up there a lot of times when I was up there.

Q. She was up there a lot of times when you were up there? A. Yes.

Q. Tell me, yesterday you demonstrated a freeze to the Court. Are you an expert? A. I am not a chemist.

Q. How many times have you done this freeze? A. Quite a few times.

Q. Quite a few times? A. Yes.

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Q. Then you are qualified by the number of times to test narcotics? A. I am not qualified for anything.

Q. But you have done the freeze many times, have you not? A. A few times.

Q. About ten times, would you say? A. I don't know how many times.

Q. Give us your best recollection. A, Seven or ten times.

Q. Can a freeze be had with novocain? A. No.

Q. At any of these instances that you visited Icky Thorn with Jesse Colson did you see Colson give any package or packages to Icky Thorn? A. No.

Mr. Archer: That is all.

Cross Examination by Mr. Pogoda:

Q. Now I heard you say your name is Schoolboy. A. Yes, sir.

Q. How did you come by that name? A. Well, when I came out of the Navy I was selling books, History of

World War I and History of World War II, and there was a poolroom I was going by there, I was playing pool,

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and I used to have my books on the bench and there was a fellow named Cuddy, and he started calling me Schoolboy.

Q. How long did you sell these books? A. I don't think I made a sale.

Q. Had you worked before you went into the Navy? A. No.

Q. And did you then find a job with the Apex Company? A. Yes.

Q. As an orthopedic mechanic? A. No, as a floor sweeper when I first started, doing odds and ends, things around the shop.

Q. And then you advanced to become an orthopedic mechanic? A. No, I learned it just working with my boss.

Q. When you left in 1956 how much were you earning a week? A. I think I was—actually on the payroll was about $84 but I was getting—

Q. Money under the table? A. Yes. The boss used to keep—

Q. Petty cash? A. No. He used to give me about $10

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extra because I used to go down on Saturdays and work, and he gave me a flat $10 for working on Saturday.

Q. At the time you left in 1956 to work in your godmother's cleaning store you were earning $84 a week and you were making $10 on Saturday? A. Yes.

Q. How much were you going home with each week? A. I don't know exact.

Q. $80 a week? A. I don't know. I can't tell you exact.

Q. $75 a week? A. You could call down to the shop and I think—

The Court: Well, was it about $75?

The Witness: I don't know how much they was deducting from me. It run about $74, right in there some place.

Q. And were you living with your family at that time? A. No.

Q. Are you supporting your family?

Mr. Starkey: Objection.

Mr. Pogoda: On the credibility, Judge.

Mr. Starkey: I see no relevancy.

The Court: Just answer the question, are you

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or not.

The Witness: Yes, to the best of my ability.

Q. Now when you went to work in your godmother's store did you start collecting policy?

Mr. Starkey: Objection.

The Court: Well, are we going to go over this again?

Mr. Pogoda: I want to show that he left a legitimate employment for an illegitimate employment.

The Court: Overruled. You worked policy at the same time you worked with your godmother's store?

The Witness: Yes.

Q. So that from 1956 to 1960 you were in the policy racket?

Mr. Starkey: Objection.

The Court: I think he said he was. You did sell during that period, didn't you, policy?

The Witness: Yes. I wasn't a day-to-day man. When I picked up a few dollars, all right.

Q. And you went to work, returned to Apex in September of 1960, is that right? A. Yes.

Q. Yet in November of 1960 you were arrested for policy, were you not?

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Mr. Starkey: Your Honor, I submit that—

A. No, sir.

The Court: He said no. You were not arrested in 1960 for policy?

The Witness: No, sir.

Q. Were you asked this question yesterday:

"Q. Would you tell the Court and jury when and what crimes you have been convicted of? A. I was convicted for disorderly conduct in 1951, and policy November 27, 1960."

Did you answer the question that way?

Mr. Starkey: Your Honor, I object at this time because counsel is reading a question and answer which occurred yesterday but it does not contradict anything that the witness has said. He testified about an arrest. The question and answer relates to a conviction.

The Court: I sustain the objection. You better clarify your question.

Q. Well, now, did you engage in policy after you returned to work? A. No.

Q. You returned to work on September 6, 1960? A. Yes.

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Q. Is that true or is that not true? A. Yes.

Q. Did you not tell us yesterday that you were convicted for policy on November 27, 1960? A. But the conviction in the time that I was arrested is two different things.

Q. You mean you pleaded not guilty in that case? A. I pleaded not guilty.

Q. I am asking you, did you plead not guilty?

Mr. Starkey: Your Honor, I will object to any further exploration in this area.

The Court: When were you arrested for this policy, do you remember, in '60?

The Witness: I think it was, the best I can remember it was in June.

The Court: June of 1960?

The Witness: Yes. June or July.

The Court: And then the case came up in November of 1960?

The Witness: That is when it was disposed of in the same year.

The Court: In November, 1960?

The Witness: It was December 27th of last year.

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Q. December 27th? A. Yes, December 27th of last year.

Q. You know November 27th was a Sunday, don't you? Is that why you are changing your answer?

Mr. Starkey: Objection, your Honor, counsel is testifying and he is not asking single questions also.

Leon Ellis—for Government—Cross

Q. All right, let me ask you this—

The Court: He has withdrawn the question, I think.

Mr. Starkey: All right.

Q. Between June and the time you returned to work did you continue to take numbers? A. No.

Q. When did you apply back for your job? A. Ask that question again, please.

Q. When did you ask your boss to take you back to work at Apex? A. That is like the other question you asked me.

Q. Answer this one, if you will. A. Repeat it.

The Court: When did you try to get your job back or try to get a job at Apex?

The Witness: I went down there on that date—

The Court: The same day?

The Witness: Yes, and started to work.

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The Court: That was what, September?

The Witness: September 6th, in that period of time.

Q. Around Labor Day, is that it? A. (No response.)

Q. Was it around Labor Day that you went back to work? A. It was the first, second or third week in September.

Q. Now, between June and September when you went back to work weren't you still engaged in policy? A. I wasn't working in June. I only started back to work in September.

Leon Ellis—for Government—Cross

Q. Between the time you were arrested for policy and the time you went back to work for Apex were you still taking policy numbers? A. When I went back to work for Apex?

Q. That is a very simple question. I submit that—

Mr. Starkey: I also submit that the question is objectionable.

The Court: Well, in June, July and August of 1960 were you taking policy numbers.

The Witness: Yes.

The Court: You were?

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The Witness: Yes.

Q. Now you went back to work at Apex because the New York City Police Department made an intensive drive on policy drops in Harlem, isn't that so?

Mr. Starkey: I object, your Honor. I think this is extremely collateral.

The Court: I think the jury would like to hear a little bit about this case.

Mr. Pogoda: It is a matter of credibility, Judge.

The Court: I know but you have been through it many, many times. He has admitted that he has been in policy many, many times. I think we ought to get on to this case, that is if you want to ask him about this case.

Mr. Pogoda: I expect to go very thoroughly into this case, your Honor.

The Court: All right.

Q. When did you start trafficking in narcotics? A. In '57.

Q. You knew nothing about narcotics before 1957? A. As far as cocaine—

Q. What narcotics did you use or traffic in before? A.

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I didn't use narcotics.

Q. What narcotics were you familiar with before you became familiar with cocaine in 1957? A. I wasn't that much familiar with it.

Q. Were you familiar at all with narcotics? A. Well, no. I heard about it.

Q. Did you ever know people who used narcotics?

Mr. Starkey: Objection.

A. I did.

The Court: He said he did.

Q. Did you know people who sold narcotics?

Mr. Starkey: Objection.

The Court: That is overruled. This is cross-examination.

Q. Did you know people who pushed it? A. Well, no.

Q. And yet when you met Colson in 1957 you heard he was in the narcotics business, isn't that so? A. Yes.

Q. Where did you learn that? A. In the street.

Q. From whom? A. From people in the street.

Q. Was it being advertised in the street? A. Well, yes.

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If a person is in the business a guy will tell you, there is a guy, he is in the business. You know, you hear that all around.

Q. Now, from how many different people did you hear that? A. It was around.

Q. When you say in the street can you tell us where? A. That you could hear a conversation like that.

Q. Yes. A. Well, all over Harlem.

Q. You mean up and down the streets and avenues of Harlem everybody knew that Jesse Colson was in the narcotic business? A. Yes. It was just about that.

Q. You knew Jesse Colson was a seaman, did you not? You knew Jesse was a seaman, didn't you? A. Yes.

Q. And you knew he made trips for weeks at a time, isn't that so? A. Did I know before or after?

Q. In 1957 you knew he was a seaman, did you not? A. Yes.

Q. And you knew he went on a ship, made a foreign

trip, came back, maybe stayed in port a day or two and went back again, isn't that so? A. I wasn't watching him that close.

Q. But you said you heard everywhere you went that Jesse Colson was a narcotic peddler? A. In other words, when he would come around you would hear the word.

Q. How often would he come around? A. I don't remember how often he could come around.

Q. Once a month? A. I don't know. I don't remember.

Q. Once in two months? A. (No response.)

Q. Every day? A. I don't remember.

Q. You don't know, do you? A. No.

Q. Now, do you know anyone that knows Jesse Colson other than the people you have mentioned on this witness stand? A. (No response.)

Q. People that you know that know Jesse Colson. A. (No response.)

Q. Other than the people whom you have mentioned in

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this court. A. Do I know people that know him?

Q. Yes, other than those you have told us about now. A. Yes, I know other people that know him.

Q. All right, let's have their names. A. His wife, and his brother-in-law, and his brothers, all them know him.

Q. And they all told you he is a pusher of narcotics? A. No. We wasn't in the street. I was always in their house.

Q. Who in the street—that is the point I want- who in the street pointed out Jesse Colson to you as a narcotic seller? A. I don't remember.

Q. You can't give us any names, can you? A. No.

Q. Did you know any narcotic pushers? A. No.

Q. Yet you wanted to go into this business to sell narcotics, am I right?

Mr. Starkey: I object to the form of the question, your Honor.

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The Court: I think you are arguing with the witness now. Rephrase your question, please.

Q. When you met Jesse Colson did you ask him to let you work for him? A. Yes.

Q. What sort of work did you want to do for him? A. Well, anything that he wanted me to do.

Q. Could you do any work for him as a seaman? A. No.

Q. The only work you could do for him was in connection with narcotics, isn't that so? A. Listen, when we was out in the street he wasn't sailing.

Q. That's right. The only work you could do for him was narcotics, isn't that so? A. Yes.

Q. And you wanted to get into this business to sell narcotics to pushers, isn't that so? A. What do you mean by a pusher?

Q. You don't know what I mean by a pusher in the narcotics business? A. I think I know but I want to know—

Q. What do you know as a pusher?

Mr. Starkey: Your Honor, I will object to this

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line of questioning. I don't think this is of any great importance.

The Court: Overruled. Tell us what a pusher is.

A: It is a guy in the street selling narcotics.

Q. And you wanted to make a deal for Jesse with these men here, am I right? A. Yes.

Q. And you found such a man in Tillie, isn't that so? A. I found that wanted to buy, yes.

Q. Tillie was the first customer you got, isn't that so? A. Yes.

Q. Did you get other customers for Jesse Colson? A. Yes.

Q. Did you tell Mr. Starkey about the other customers? A. Well, he did not ask me.

Q. He was only concerned about the men in this case, isn't that so? A. I don't know what he was concerned about.

Q. That is all he questioned you about, about the men in this case, isn't that so? A. He asked me did I know people and I told him yes.

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Q. He asked you if you knew Maxie? A. I don't remember.

Q. He did not ask you whether you knew Maxie?

Mr. Starkey: I will object, your Honor. The witness testified he couldn't remember.

The Court: He said he doesn't remember. Ask another question.

Q. Did he ask you if you knew Hawk? A. I don't remember it.

Q. Did he ask you if you knew Purry? A. Yes.

Q. Did he ask you if you knew Duke? A. No.

Q. Never asked you if you knew Duke? A. Duke who?

Q. Duke? Didn't he refer to someone by the name of Duke? Just as Duke. A. No.

Q. He did not? A. No.

Q. Did he ask you if you knew Massiah? A. Yes.

Q. Did he call him Massiah or did he call him Winston?

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A. Winston Massiah.

Q. Mr. Massiah. A. Winston Massiah.

Q. Did he ask you if you knew Colson? A. Yes.

Q. Didn't he also ask you if you knew a man named Leon, also known as Booby? A. Yes.

Q. On 146th Street? A. No, 136th Street.

Q. Did he ask you whether you knew a man named Leon, also known as Booby at 146th Street between Eighth Avenue and the Skin Joint?

Mr. Starkey: Your Honor, if counsel is going to read from the witness' statement, I would ask that

the questions and answers be read rather than paraphrase it.

Mr. Pogoda: I will offer in evidence at this time Court's Exhibit 10 for identification.

Mr. Starkey: No objection.

The Court: Mark it.

(Court's Exhibit 10 for identification received in evidence as Defendant Anfield's Exhibit D.)

Q. Now I show you Defendant's Exhibit D in evidence and ask you whether or not you ever saw Mr. Starkey in

possession of these small sheets of paper as he spoke with you? A. I don't remember seeing them.

Q. You say that Mr. Starkey did not have those papers?

Mr. Starkey: Your Honor, I object. The witness testified that he didn't remember seeing them.

Mr. Pogoda: I haven't finished my question. I don't think it is proper for him to interfere.

The Court: He said he doesn't remember seeing them.

Mr. Pogoda: I am trying to refresh his recollection.

The Court: All right, ask your question.

Q. Now as Mr. Starkey spoke to you did he ever have these yellow sheets in front of him? A. Yes.

Q. Did you see writing on these yellow sheets? A. Yes.

Q. Did you ever see a paper this size in Mr. Starkey's office? A. I don't remember.

Q. As Mr. Starkey called off Massiah's name you didn't see that he made a dash alongside of it? A. No.

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Q. You didn't see that? A. No.

Q. As he called Leon's name did he say first Silver, Leon?

Mr. Starkey: What?

Mr. Pogoda: This is your handwriting.

Mr. Starkey: Your Honor—

Mr. Pogoda: This is an exhibit in evidence.

The Court: I guess you are about at the end of the list so I will overrule the objection.

Q. Now Mr. Starkey, did he ask you anything about January or February with Leon on 125th Street? A. No. I don't remember that. No.

Q. Nothing like that at all? A. No.

Q. Now, Mr. Ellis, can you tell us again when for the first time you were questioned by Mr. Starkey? A. I don't remember the date.

Q. The day after your arrest. A. Yes.

Q. And was a stenographer present on that occasion? A. Yes.

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Q. And were you told by Mr. Starkey that you didn't have to answer any questions, you have a constitutional right not to answer any questions? A. Yes.

Q. Did Mr. Starkey say what might happen to you if you didn't answer any questions? A. No.

Q. He didn't say you were charged with a serious thing and if you cooperated with the government you would receive consideration? A. He told me if I tell the truth that my testimony would be considered by the Court.

Q. Did Mr. Starkey also tell you there was a case pending in this court against Jesse Colson, Winston Massiah,

Mitchell Anfield, and a number of other men, Icky Thorn, Sylvia Ferris? A. No, he didn't tell me that.

Q. Well, now, when you were speaking to Mr. Starkey, was it about the case on which you were arrested or was it to be on a case in which Jesse Colson and the other men were arrested? A. It was about my case.

Q. About your case? A. He asked me—

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Q. Just a moment. It was about your case? A. (No response.)

Q. Where were you arrested? A. 139th Street in front of Carter's Corner Bar and Grill.

Q. Did you have any narcotics on you when you were arrested? A. No.

Q. Now, when the officers came over to you did you ask them why they were arresting you? A. No, they didn't give me a chance to ask them why.

The Court: Well, this might be a good time to take a recess. We will recess now until 2:15 under the same instructions as before.

(Recess to 2:15 p.m.)

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AFTERNOON SESSION

2:15 p.m.

(Jury present.)

LEON ELLIS resumed.

Mr. Starkey: Before the Court proceeds, Exhibit 22 for identification has not been marked into

evidence. I would ask that it be received at this time.

(Government's Exhibit 22 for identification received in evidence.)

Mr. Carluccio: Your Honor, may I approach the bench along with Mr. Starkey for one moment?

The Court: All right, step up Mr. Starkey, please.

(Discussion at the bench off the record.)

The Court: All right, proceed, Mr. Pogoda, please.

Cross Examination by Mr. Pogoda (Continued):

Q. Now, Mr. Ellis, during this luncheon recess did you have occasion to speak to anyone connected with the government? A. No.

Q. You had no conversation with Mr. Murphy, the government agent? A. No.

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Q. Or any of the other government agents assigned in the witness room? A. Not a conversation, no.

Q. Did you leave the building during this luncheon recess? A. Yes.

Q. In the company of anyone? A. Yes.

Q. In whose company? A. A Treasury agent.

Q. How many? A. One.

Q. And you had no conversation with him at all? A. Not about the trial, no.

Q. Not about what? A. Not about the trial, no.

Q. Well, now, do you recall at what time you were arrested? A. I would say about 9:30, 10 o'clock.

Q. In the evening? A. Yes.

Q. In front of Carter's Bar? A. Yes.

Q. Were you arrested by arrangement, Mr. Ellis? A. I don't think so.

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Q. Did you know you were going to be arrested? A. Well, I wished I did. I don't think I would have been there.

Q. Was anyone in the company of the agents? In other words, was there anyone you knew accompanying the agents at the time of your arrest? A. No.

Q. Tell us what happened as they approached you. A. Well, I was standing there talking to a friend and an agent came over to me and tapped me on the shoulder and said "Treasury agent" and grabbed me by the arm, and a couple of cars pulled up and they put me in the car.

Q. Did they ask you your name? A. No. They told me my name.

Q. Did you admit you were Leon Ellis? A. Yes.

Q. And then you were taken down to West Street? A. Yes.

Q. Now the following morning I take it you were taken out of West Street and brought to this building, isn't that so? A. Yes.

Q. Were you taken into Mr. Starkey's office or were you

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taken before a commissioner? A. I was in Mr. Starkey's office first.

Q. And is that when this question and answer were taken down by a woman? A. Yes.

Q. And it was after then that you were arraigned before a commissioner in this building? A. Yes.

Q. And you were paroled in your own custody? A. (No response.).

Q. You were released on your own recognizance? A. Yes.

Q. Now at that time were there charges read to you? A. Yes.

Q. And those charges said that you were trafficking in narcotics? A. I don't know exact what—

Q. Did it use the word "conspiracy" in the charges that were read to you? A. I don't remember exact.

Q. Now were the charges read, if you recall, Mr. Ellis, a sworn affidavit by Agent Finbarr Murphy who said that "On February 12, 1958, you, unlawfully, wilfully and knowingly did receive, conceal, sell, facilitate, the trans-

portation, concealment and sale of a narcotic drug, to wit, approximately six ounces of cocaine." Was that read to you? A. Yes.

Q. Now, were you in the narcotics business on February 12, 1958?

Mr. Starkey: Your Honor, I will object. I don't think the question is clear.

A. I didn't understand that question.

Q. Did you have in your possession in the Southern District of New York on February 12, 1958, six ounces of cocaine? A. I wasn't in New York February 12th.

Q. You told that to Agent Murphy when you were arrested, did you not? A. I don't remember.

Q. Did you tell that to Mr. Starkey before you appeared in court on this day when this charge was read to you? A. I don't remember.

Q. Did you not tell us before that when you discussed this matter with Mr. Starkey that you told him that you

left New York January 28, 1958, and returned here on February 28, 1958? A. Yes.

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Q. That is true, isn't it? A. I left January 28th—

Q. And returned on February 23rd? A. Yes.

Q. Isn't that true? A. Yes.

Q. You told Mr. Starkey that you had been to Chicago and to Mississippi to attend your mother's funeral? A. Yes.

Q. And you told him that before you were taken before the commissioner, isn't that so? A. I don't remember.

Q. You didn't conceal that fact from Mr. Starkey or Agent Murphy, did you?

Mr. Starkey: Your Honor, I object.

Mr. Pogoda: If the Court please, each time the defense is about to make a telling point Mr. Starkey rises and attempts to—

Mr. Starkey: I object to speeches on the part of defense counsel.

The Court: Overruled. Did you conceal this from the government or Mr. Starkey or any representative

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of the government, the fact that you were in Chicago and Mississippi during January and February of 1958?

The Witness: I don't remember, your Honor. Maybe I did and maybe I didn't.

Mr. Starkey: May I make clear the basis of my objection that it assumes a fact not in evidence: namely that he was asked where he was prior to the arraignment.

Leon Ellis—for Government—Cross

Mr. Pogoda: There is in evidence Defendant's Exhibit D.

The Court: Suppose you continue.

Mr. Pogoda: May I have Defendant's Exhibit D. I think you have it, Mr. Starkey. It is among your notes.

Mr. Starkey: Defendant's Exhibit D?

Mr. Pogoda: Defendant's Exhibit D. Your notes of your conversation with him.

(A pause.)

Mr. Pogoda: I am now reading from Defendant's Exhibit D, Mr. Starkey's own notes.

Mr. Starkey: Your Honor, I object.

Mr. Pogoda: May I then be permitted to read it to the jury?

Mr. Starkey: I wish to object on this ground,

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your Honor, that counsel is implying that these notes were taken at the time that he was first brought into the office. I wish to object on that ground.

Mr. Pogoda: My implication—I wouldn't want to express it before the jury.

The Court: Just read it. I think the jury knows that it was the typewritten statement taken from the defendant the first time that he was in the office of Mr. Starkey and that these notes on the brown paper came later. Read what you want to now, Mr. Pogoda.

Mr. Pogoda: "January 27, 1958, witness's mother died."

I assume W. S. an abbreviation for the witness.

"After witness returned from Chicago on February 22nd he saw Jesse at witness' house, 149 West 140th Street."

Q. You told that to Mr. Starkey in one of your interviews, did you not? A. After I returned?

Q. When you were in Mr. Starkey's office on one occasion didn't you tell him that between January 27th or January 28th and February 22nd you were in Chicago and Mississippi and not in New York? A. Yes.

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Mr. Starkey: Your Honor, before the examination proceeds, at this time I object and move to strike the statement of counsel at the time, something about an implication that he did not want to make before the jury. I so move now and ask that counsel be directed not to make statements like that during the course of the trial.

The Court: I don't know what Mr. Pogoda had on his mind at the time but I would like to get on with this cross-examination.

Q. Then on February 12, 1958, you were not here in New York and you had no narcotics in your possession? A. No.

Q. And this is the only charge pending against you as a result of your arrest, isn't that so? A. The only charge pending against me? I have a number of cases in the city building pending against me.

The Court: A number of cases pending against him in the city building.

Q. Before Mr. Starkey called in the stenographer how long did you spend with him? A. I don't know exact the time. About half an hour, 45 minutes.

Q. And during this time did Mr. Starkey show you pictures of various people? A. Yes.

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Q. Did he call them by name? A. Did he call them by name?

Q. Yes. A. Yes.

Q. He showed you a picture of Duke and he said "Do you know Duke?" Is that the way he did it? A. I think Agent Murphy asked me that.

Q. Agent Murphy showed you the pictures? A. Yes.

Q. This was only six weeks ago. A. When I was downtown.

Q. And he asked you whether you knew Duke? A. Yes.

Q. Then he showed you a picture of Icky Thorn and asked you whether you knew Icky Thorn? A. Yes.

Q. And as he showed you the pictures he told you who the man was? A. Yes.

Q. You knew him? A. Yes.

Mr. Starkey: Just one moment, your Honor. That was a double question and I want to make sure what

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the witness' answer was, whether or not he knew them or whether he was told at the time the picture was shown to him the identity of the individual.

The Court: Well, the witness said he knew them, as far as the record shows, as far as my understanding of the statement was.

Mr. Starkey: The answer was after two questions were asked, your Honor.

The Court: Let's proceed with this cross-examination, if you don't mind.

Q. Now you told Mr. Starkey everything you told us on the witness stand yesterday and today before the stenog-

rapher was called into his office, isn't that so? A. I don't know.

Q. Well now, tell us what you discussed with Mr. Starkey before he called in the stenographer. A. I was talking to Agent Murphy and Mr. Starkey.

Q. All right, tell us what you said, what Mr. Starkey said and what Agent Murphy said. A. I was told what I was being charged with.

Q. Were you told that it was February 12th that you had six ounces of cocaine? A. No.

Q. Well, what were you told you were being charged

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with? A. Violating the Narcotic Act.

Q. Did they tell you what specific thing you did on what date, when and where? A. No.

Q. They said you were charged with narcotics. A. Violating the Narcotic Act.

Q. Did you tell them you had no narcotics on you when you were arrested? A. Yes. They searched me. They didn't find any.

Q. At the point they told you you were charged with narcotics didn't you tell them that you had no narcotics, they didn't catch you with any narcotics? A. No, I don't think.

Q. You knew they had nothing on you, didn't you?

Mr. Starkey: Objection.

The Court: How did he know what the government had on him?

Mr. Pogoda: He has been in this situation before, Judge.

Mr. Starkey: I will object to comments of counsel also, your Honor.

Leon Ellis—for Government—Cross

The Court: I sustain the objection and instruct the jury to disregard counsel's comment. Proceed.

Q. What else was said? A. (No response.)

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Q. Before the stenographer was called in. A. He just asked me about these pictures and how long I knowed them, and what kind of dealings I had with them.

Q. And what did you tell them? A. I told the district attorney that I wanted to tell the truth about everything that I know about this.

Q. Did you tell the truth? A. The best of my ability and the best I can remember at that time, yes.

Q. This is before the stenographer was called in now, did you tell them everything? A. No, it wasn't before.

Q. After you said you would tell the truth didn't you tell them; did they ask you what did you do about each of the men? A. I don't understand.

Q. Did they ask you what you knew about each of the people whose pictures they showed you? A. Well, they asked me what connection I had with those people.

Q. And you told them the connection you had with these

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people, isn't that so? A. Well, the best I could remember at that time, but as I thought back I thought of a lot of more—

Q. I am now speaking before the stenographer was called in. A. No.

Q. At that point didn't you discuss what you knew to the best of your ability? A. No.

Q. You mean before the stenographer was called in you did not tell Mr. Starkey or Agent Murphy any facts, how long you knew Icky Thorn, how long you knew Jesse Col-

son, how long you knew Duke, and things like that? A. I don't think so.

Q. Now do you remember before we recessed this morning I asked you whether or not Mr. Starkey asked you or whether you were asked, do you know Duke, and you said you were not asked, do you remember I put that question to you before we went out for lunch?

Mr. Starkey: Your Honor, at this time I will object to counsel characterizing testimony unless he is going to read the question and the answer. That is not my recollection of the witness' response at that time and I am going to object to characterizations of that kind.

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The Court: Make your point in some other way. You always get into difficulty when you try to remember previous testimony.

Mr. Pogoda: Each time I ask a question about which there is a conflict Mr. Starkey is on his feet trying to straighten out the witness.

Mr. Starkey: I object to such a remark and ask the Court to reprimand.

The Court: Mr. Pogoda, please desist from making remarks of that kind.

Q. Before we went out to lunch do you recall I had this piece of paper which I showed you, do you remember that? A. Yes.

Q. And don't you recall I asked you whether or not Mr. Starkey asked you if you know Maxie, did you know Hawk, did you know Purry, did you know Duke, do you remember I asked you those questions? A. Yes.

Q. And didn't you tell this Court and jury that you were not asked those questions, those names? A. I don't remember.

Q. You don't remember that I asked you the question? You don't remember I asked you the question? A. I re-

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member you asked me something like that but I don't know direct what it was.

Q. Will you look at that and tell us what names are on there?

Mr. Starkey: Your Honor, if counsel wants the document read to the jury I think that should be done. I am not clear at this point whether or not what this witness sees on those papers has to do with it.

Q. Can you read the names? A. No, I would like to read them, sir.

Q. You can't read, can you? A. Sure I can read, some.

Q. Can you read at all? A. Yes.

Mr. Pogoda: May I have the original statement.

Q. I show you this paper, Court's Exhibit 11 for identification, and ask you whether or not you had this paper in your hand this morning? A. Yes.

Q. Did you go through the pages as if you were reading them this morning? A. Yes, various things.

Q. Mr. Ellis, will you please read the first question there?

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Mr. Starkey: Your Honor, I don't think that document is in evidence.

Mr. Pogoda: I will offer it in evidence.

Mr. Starkey: May I check that, Mr. Witness, and see if—no, it is not. It is marked Court's Exhibit 11 for identification. The government has no objection.

The Court: Received.

(Court's Exhibit 11 for identification now Defendant's Exhibit E in evidence.)

The Court: All right, give it back to the witness, please. You want him to read the first question.

Mr. Pogoda: Yes.

The Court: Do you want him to read it aloud?

The Witness: "You gave a statement where you answered some questions that I asked you on that 25, 1961, in this office with Agent Murphy also present and same lady taking the notes on that occasion. Do you recall that? Yes."

Q. Now, Mr. Ellis, on this day that you were being questioned by Mr. Starkey in the presence of Agent Murphy you were asked a lot of questions, am I right? A. Yes.

Q. And the answers you gave on that first day, that

you read, that were typed up, were they true or were they not true? A. Well, they was true to the best of my ability at that time and a few days later I remembered things that had happened and I came and told Mr. Murphy about them.

Q. Well now, you were in court that same afternoon that you saw Mr. Starkey, isn't that so? A. Yes.

Q. When this affidavit which I told you about was read to you before the commissioner, am I right, that affidavit? A. Yes.

Q. Now, did you see Mr. Starkey the following day? A. I don't think so.

Q. Did you go home that night? A. Yes.

Q. Back to your own home? A. Yes.

Q. At 140th Street? A. Yes.

Q. And when was the next time you saw Mr. Starkey

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or Agent Murphy? A. I would say the next couple of days.

Q. In this building? A. Yes.

Q. Did they call in a woman stenographer that time? A. No.

Q. When did they call in a woman stenographer? After how many times?

Withdrawn.

When did they call in a woman stenographer the second time? A. For the identification of a picture.

Q. When? A. I don't know the date.

Q. No idea of the date? A. No.

Q. A week later, after you were arrested? A. It was probably three or four weeks, or five weeks.

Q. Now, from April 24th when you were arrested until today you cannot tell us now when for the second time a woman stenographer was called in to Mr. Starkey's office? A. Not the direct date, no.

Q. Can you give us—was it this week?

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The Court: I think he has answered the question. He said four or five weeks after the first time, as I understand his answer.

A. That's right, sir.

The Court: Is that your answer?

The Witness: Yes, sir.

The Court: That is what he said.

Q. How many times had you seen Mr. Starkey and Mr. Finbarr between the time there was the first stenographer and the second time? A. I would say six or seven times.

Q. And what happened on each of these visits? A. Well, the things that came to my mind, and I know that I did them, I came down and told them.

Q. You came down to this building voluntarily? A. Yes.

Q. To offer information to Mr. Starkey and to Mr. Murphy? A. Yes. Your Honor, could I make a statement, please?

Mr. Pogoda: I am going to object to any statements unless it is responsive to a question.

The Court: Suppose you just answer the question and then you can consult with Mr. Starkey and maybe he will want to ask you a question about that.

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Q. Now, did you change your recollection of things that happened on each visit, or some of the visits? A. Well, the things that I remember, and I remember them a little clearer, I tried to straighten them out and tell him the best that I know about it later. I voluntarily came down and told him.

Q. Did Mr. Starkey or Mr. Murphy fill you in on information you had forgotten? A. No.

Q. They never suggested any information to you? A. No. Mr. Colson did.

Q. Mr. Colson did? A. Yes.

Q. Where did you meet Mr. Colson? A. This is Jesse Colson. Where did I meet him at?

Q. Yes. A. Down in the office.

Q. Mr. Starkey's office? A. Yes, sir.

Q. How many times did you see Mr. Colson down in Mr. Starkey's office? A. Three or four times.

Q. Did you go over the case with Mr. Colson in the

presence of Mr. Starkey and Mr. Murphy? A. No. We was in another room.

Q. Now when you went back over the case with Mr. Murphy and Mr. Starkey, was Jesse Colson along with you?

The Court: Were you all in the same room?

The Witness: Yes. Once or twice, yes, in the same room.

Q. And when you were talking, Jesse corrected you and when Jesse talked you corrected him? A. Jesse would ask me—he don't think it was like this; he think it was like this. And as he talked, it came back to me and I said yes, it was like that.

Q. So that you and Jesse Colson were in Mr. Starkey's office preparing to testify in this case, right? A. I don't know. I don't recall that, no.

Q. Wasn't the purpose for you and Jesse to be there at the same time, to rehearse so you could both come into court and tell the very same story? A. No, sir.

Mr. Starkey: I will object, your Honor. I don't see how the witness could be asked to know the purpose of his visit to the office.

Leon Ellis—for Government—Cross

The Court: The witness said no anyway so let's proceed.

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Q. Now, when you came down to Mr. Starkey's office the first time that you saw Jesse Colson did you know Jesse Colon was going to be there? A. No.

Q. Now, when you left that day did Mr. Starkey or Mr. Murphy say to you, "Come back here on this day"? In other words, was there an appointment made for a specific day and time for you to return to Mr. Starkey's office? A. Agent Murphy would tell me that he wanted to see me.

Q. He told you when? A. (No response.)

Q. He told you when he wanted to see you? A. He said, "Come by the office."

Q. And wasn't Jesse Colson there? Wasn't he told to come back at the same time? A. I don't know. We wasn't there at the same time.

Q. But you came back a second time and you found Jesse Colson there? A. Yes.

Q. And you came back a third time and found Jesse there? A. Well, it was three or four times.

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Q. That's right. How recently was the last time that you and Jesse Colson were there? A. We wasn't in the office talking but we was outside the office.

Q. When, for the last time—the last time you saw him. A. I think it was last Wednesday morning, him and his lawyer came in.

Q. Did you see him there Tuesday? A. (No response.)

Q. The day before that? A. No.

Q. Did you see him on that Monday? A. No.

Leon Ellis—for Government—Cross

Q. Did you see him the previous Friday? A. I don't remember.

Q. All right. When was the time before last Wednesday that you saw Jesse Colson in this building near Mr. Starkey's office? A. The time before last Wednesday?

Q. Yes. That was the last time you saw him? A. Would you mind repeating your question, please.

Q. You saw him last Wednesday, is that correct? A. Yes.

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Q. When before then did you see him in Mr. Starkey's office? A. I think it was—it was that following Thursday.

Q. You mean the previous Thursday? A. Yes.

Q. The Thursday before last Wednesday? A. That's right.

Q. When was the time before that? A. I don't remember exact. Maybe a couple of days before that last time.

Q. Now, Mr. Ellis, can you tell me where it was that you first spoke to Jesse Colson uptown? A. It was on 140th Street, on the corner.

Q. In front of Carter's Bar? A. No. In front of the High Hat.

Q. In front of what? A. The High Hat Bar and Grill.

Q. Are you a customer there too? A. I am a customer around the neighborhood.

Q. A customer of all the bars uptown? A. No.

Q. How many bars do you go into uptown? A. Just about as many as I feel like going if I have enough money

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to go into them.

Q. Do you do business in these bars? A. What kind of business?

Q. Narcotics business. A. No.

Q. Policy business? A. No.

Q. Did you do policy business there?

Mr. Starkey: Objection.

The Court: Well, we keep going back to the policy business and I don't think it has anything to do with this trial.

Mr. Pogoda: On credibility, Judge, as to what this fellow does for a living and how he earns his living.

The Court: We have been doing that for several hours now. I think the jury is interested in this case and I assume you are too so let's proceed to discuss this case.

Q. At what time of day or night was it? A. When I first met Colson?

Q. Yes. A. It was in the afternoon.

Q. Did you walk up to him or did he come up to you?

A. No. I had been seeing him with a friend of mine and we just came up in the conversation.

Q. Tell us how you approached him and what you said. A. Well, there was a gang of fellows around the circus talking, in other words it wasn't an introduction then.

Q. What were the first words you said to Jesse Colson? A. What was the first words I said?

Q. Yes. A. I don't remember.

Q. Well, how did you get involved in this discussion about narcotics with him? A. I asked him.

Q. Where? A. Where?

He had a rented car and I was in the car.

Q. Well, now, you were standing on the sidewalk in a group when you first saw him, am I right?

Mr. Starkey: Your Honor, I ask the witness first of all not to answer until I state my objection. But your Honor, counsel is switching back and forth. He is asking about a cocaine conversation and the first

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time he ever talked to him. Now I ask that counsel not confuse the witness and to make his questions clear.

Mr. Pogoda: I object to the characterization of my confusing the witness. That is a gratuitous statement that I think is uncalled for.

The Court: All right, sir. The jury will disregard counsel's statement with reference to confusing the witness.

Now let's get back to the first time you talked to Colson. Now, when did you talk to him? Where was this?

The Witness: On the corner of 140th Street.

The Court: And where was he and where were you?

The Witness: Five or six people was there—

The Court: Were you standing on the corner?

The Witness: Yes.

The Court: Sitting on the corner?

The Witness: Standing.

The Court: That is when you saw him first?

The Witness: Yes.

The Court: After you talked to him on the corner for awhile did you leave the corner?

The Witness: Yes.

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The Court: And then you went where?

The Witness: I was around the area.

The Court: Where did you get into a car?

The Witness: This was later.

The Court: That was a different occasion altogether?

The Witness: Yes.

The Court: I think you should clarify that.

Mr. Pogoda: I have no objection to that.

Q. The first time you saw Jesse Colson and spoke with him there was no talk about cocaine? A. No.

Q. No talk about working for him? A. No talk about what?

Q. No talk about working for him so that you could make some extra money. A. No.

Q. When was this, the latter part of November? A. When I first met him?

Q. Yes. A. Well, I don't know. It was in the fall of the year.

Q. In the fall of the year? A. Yes.

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Q. When you say the fall of the year would you say it was November or October or September? Which? A. September or October or November. One of those months in there. I met him around about September as close as I can get to it.

Q. You can't tell us now whether it was September, October, November or December?

The Court: He said that he thinks it is September now. He said it was the fall but he thinks it was September. Now let's get on to something else.

Mr. Pogoda: May we have the Court's indulgence for one moment?

The Court: Yes.

(A pause.)

Q. When you first met Jesse Colson in the fall of the year, say September, did you see him regularly after that? A. I don't remember.

Q. Can you remember the very first time you spoke to him about working for him? A. Well, that was a very dangerous decision to make and those conversations hit you pretty close sometimes.

Q. It wasn't the first time that you spoke to him that

you spoke about narcotics, was it? A. The first time I spoke to him?

Q. Jesse, yes. A. Repeat that, please.

The Court: When did you first offer to work for Jesse? When was this?

The Witness: This was around about October or November, in that period of time.

The Court: All right, take the witness.

Q. Some time in October or some time in November? A. Around about that time, yes.

Q. And this was in what kind of an automobile? A. I think it was a rented car.

Q. A rented car? A. Yes, which you rent.

Q. A small car, a big car, a medium car? A. It was—I don't know the model of the car. It was say a car like about a Chevrolet. A standard car.

Q. It wasn't a big Chrysler Imperial, was it? A. No.

Q. Did Jesse own a Chrysler Imperial? A. I don't know.

Q. Do you know what a Chrysler Imperial is? A. Yes.

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Q. It wasn't that sort of a car? A. No.

Q. Well now, after you spoke to him, first, about working for him in the narcotics business, how soon after that first conversation did you start doing business for him? A. Around the last of November or the first of December, around there.

Q. Well, how long a period, how many weeks or months was it after the first conversation when you got the first customer for Jesse Colson? A. Would you repeat that?

The Court: How long after you first talked to him about selling narcotics for him did you get him the first customer?

The Witness: (No response.)

The Court: A week or a month or what?

The Witness: Around about four or five weeks, I would say, in that length of time. That is the best I can remember right now.

Q. Now during this four or five weeks did you see Jesse subsequently? A. No.

Q. Did you see him at all? A. Yes.

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Q. How many times would you say you saw him? A. Well, I used to see him coming by the avenue. I can't remember how many times I seen him.

Q. In October or November? A. Yes.

Q. Right? A. Yes.

Mr. Pogoda: May the record show, if the Court please—this, I don't know the exhibit number—oh, yes, Exhibit 21—that the defendant Jesse Colson—

Mr. Starkey: Your Honor—

Mr. Pogoda: It is in evidence. I want to call it to the jury's attention.

Mr. Starkey: Your Honor, I suggest that there is a time for summation and there is a time for examing witnesses, and reading documents. I object to this procedure.

The Court: You will be able to call that to the jury's attention but we want to get rid of this cross-examination first.

Mr. Pogoda: I think at this time I should be permitted to read to the jury something that is in evidence which is conflicting with the witness' testimony.

The Court: You can do that at the proper time.

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Mr. Pogoda: I respectfully except to the Court's ruling.

The Court: All right, sir.

Q. Now tell us, where did you meet this fellow Tillie? A. I met him on the avenue.

Q. Where on the avenue? A. Well, listen, he was a fellow I saw him just about constantly, the biggest portion of the day.

Q. Was he a policy player? A. What?

Q. Was he a policy player? A. I don't know.

Q. Did he play policy with you? A. No.

Q. Was this arrangement made in the cleaning store that your godmother operated? A. No.

Q. After this conversation with Colson you were on the street looking for customers, am I right, to push the stuff? A. Yes.

Q. You were out to make some money in this business? A. Yes.

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Q. And you ran across Tillie, right? A. Yes.

Q. How did you get involved in the conversation with Tillie? A. Tillie saw me and he said, "Man, you are riding around with the man bringing the good coke in."

Mr. Somers: I can't hear that.

A. Tillie told me that I was riding around with the man that was bringing the good coke in. I told him, "Yes, that's my man." He said, "What about getting me some," or something like that. I said, "Yes," I said, "If you get some dough I will fix it up so that you can get some."

Q. Now at that time did he ask you how much it was an ounce? A. I don't remember.

Q. You were selling something, didn't he want to know the price of what you were selling? A. He wanted to know how much was a spoon.

Q. Did he ask you? A. Yes.

Q. How much is it a spoon? A. $50 a spoon.

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Q. Who told you that? A. My boss, who I was working for told me that, Jesse Colson.

Q. Did he tell you how much it was an ounce? A. Yes, later on, yes.

Q. Did he tell you how many spoons there was in an ounce? A. Yes.

Q. How many? A. 16.

Q. Did you ever measure them out? A. Yes.

Q. When? A. (No response.)

Q. When for the first time? A. Well, when we first got a kilo from Chile.

Q. That was in September of 1958? A. Yes.

Leon Ellis—for Government—Cross

Q. Almost a year after this conversation? A. Yes.

Q. And after you had gone through freeze tests to test the purity of cocaine, that was the first time you ever measured out any cocaine? A. Yes.

Q. Now, when for the first time did you discuss with

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Jesse Colson how much you were to be paid? A. He told me how much I was going to get.

Q. What did he tell you? A. He told me I get 10 per cent.

Q. Did he tell you that the first time you spoke to him about working for him? A. No.

Q. Did he tell youthat after you came back and told him that you had a customer? A. No.

Q. When did he tell it to you? A. When I sold the package of cocaine at one time.

Q. The package to Tillie? A. No.

Q. To whom? A. To Leon.

Q. You mean at the time you made this first sale to Tillie you did not know how much you were going to be paid for making this sale? A. No.

Q. Were you interested in finding out how much you were to make? A. No, not at that time.

Q. You got into this business for the purpose of making

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money, did you not? A. Yes.

Q. And now you say that at the time you made the sale to Tillie you did not know what your cut was? A. No.

Q. At this time you were in the policy business, were you not?

Mr. Starkey: Objection, your Honor.

Mr. Pogoda: I am making a point if the Court please. It is only one question on that.

Q. You were in the policy business, right? A. Well, I don't know whether you call it the business.

Q. You were taking numbers? A. I was a pickup boy.

Q. Before you got into that did you find out how much your commission was, or what your percentage was? A. Why my percentage was?

Q. Yes. A. Well, everybody knows what percentage is.

Q. That's right. But in this first sale you did not know what your commission was at the time you made the sale? A. No.

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Q. You knew it was a dangerous business, did you not? A. Yes.

The Court: Well, sir, we have been through it now. He said he did not know. He answered about five or six different kinds of ways. He did not know. Let's get on with the case. The jury understands the question and the answer.

Q. Now after you made contact with Tillie, how did you get in touch with Jesse Colson? A. I called him on the telephone.

Q. When did he give you his phone number? A. I don't know. While we was talking he gave me his phone number. I don't know exact when.

Q. Did you write it down anywhere? A. Yes, I had it.

Q. In an address book? A. No.

Q. Where would you write it down? A. On a card.

Q. Did you call that number many times? A. Yes.

Q. How many times in all would you say you called that number? A. I don't know.

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Q. A hundred times? A. I don't remember.

Q. Could it have been more than a hundred times? A. I don't remember.

Q. It was a great many times, though, wasn't it? A. I don't remember.

Q. You don't remember whether it was a great many times or not? A. What do you call a great many times?

Q. I am asking you.

Mr. Starkey: Your Honor—

A. I don't remember.

Mr. Starkey: —I think the witness is entitled to know what counsel means by that.

The Court: Would you say 10, 20, 50 times?

The Witness: I would say about 75 or 80 times.

The Court: 75 or 80 times.

Q. Do you remember the number now? A. No.

Q. Well now, you called Jesse Colson, and what did you say to him on the telephone? A. I said "I got a man who wants to do some business."

He asked me "How much? How much money he got?" I said "He got $300." And I said "But the man, he want

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to come to the house with me."

Jesse says "No good." He said "He can't come to the house. If he can't trust you forget about it," or a similar thing like that.

Q. And then what did you do? A. I told Tillie what my instructions were.

Q. Did Tillie ask you how much stuff he was going to get for the $300? A. It was half a piece, I think.

Q. Half a piece? A. Yes, he wanted a half a piece.

Q. How much is a half a piece? A. It is eight spoons.

Q. For $300? A. Yes.

Q. Wasn't it $50 a spoon, the price? A. Yes.

Q. Did you tell that to Colson, this man wanted half a piece for $300? A. No, I didn't.

Q. How much would eight spoons cost? A. Eight spoons?

Q. Yes. A. Buying it in the individual spoons?

Q. Yes. A. $400.

Q. And you were giving this man Tillie a wholesale rate? A. I wasn't giving him anything. Jesse made the package. When I gave him the $300 he made—he had a package, he made a package, and—

Q. Were you there when he made the package? A. No. He was in the kitchen making the package. I was in the apartment, yes.

Q. Now after you told Tillie that Jesse wanted the cash first you arranged to get the money from Tillie, am I right? A. (No response.)

Q. Isn't that so, you got the money from Tillie? A. I told Tillie if he can't trust me there is no deal. So he gave me the money.

Q. All right. Now you went up to Jesse's house to pick up the package? A. We was on 225th Street and Jesse lived in the project, and it wouldn't be up—I think it would be down, you know, from 225th Street on the same block.

Q. You went from 140th Street where you lived to 225th

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Street? A. Yes.

Q. That is in the Bronx, isn't it? A. I went from 141st Street to 225th Street?

Q. Was that 225th Street in the Bronx? A. Yes.

Q. How did you go there? A. By cab.

Q. And you gave Jesse the $300? A. Yes.

Q. You got the half a piece? A. Yes.

Q. Did you take the same cab back downtown? A. No.

Q. How did you come back downtown? A. I came back to the bar and picked up Tillie and got another cab and came back downtown.

Q. Did Jesse give you the money for the cab fare? A. Yes.

Q. When you got there Jesse gave you the money for the cab fare, when you got up to 225th Street, am I right? A. (No response.)

Q. Now let me ask you this: didn't you tell this Court and jury the stash was down on Park Avenue? A. That was another time.

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Q. You mean Jesse— A. We had the stash all around.

Q. Jesse had the stash in different places? A. Right.

Q. And he also kept stuff in his home? A. Well, a long time ago, but this time, yes.

Q. Now, did you see the package before Jesse taped it up or wrapped it up? A. No.

Q. You had never done business with Jesse before, had you? A. No.

Q. You don't know what Jesse was giving you for your $300, do you? A. No.

Q. You were responsible to Tillie for the $300, if it turned out the stuff that you received from Jesse was not cocaine, isn't that so? A. (No response.)

Mr. Pogoda: I withdraw the question.

Mr. Starkey: I submit that he should be permitted to answer the question.

The Court: He has a right to conduct his own examination.

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Q. You were trusted by Tillie with $300, isn't that so? A. Yes.

Q. And now you gave Jesse the $300 without knowing what was in that jar or package that he gave you, isn't that so? A. Yes.

Q. So now you were trusting Jesse with the $300, am I right? A. Yes.

Q. Until this time did you know what cocaine looked like? A. Until which time?

Q. The time, this first transaction, did you know what cocaine looked like? A. Yes.

Q. Where had you seen cocaine before this? A. I had seen it a lot of places before this.

Q. All through town and did you see it on store shelves? A. No, I said a lot of places.

Q. Where? What kinds of places? A. Different places.

Q. Places that you would go to? A. Well, I had to be

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at these places to see it, yes.

Q. So that before you ever got involved with Jesse in the narcotic business you were very familiar with this narcotic business? A. Well, I wouldn't say familiar with it but I know what it looked like.

Q. And you went around to places where they had a lot of narcotics? A. Well, I went places but I don't know how much they had, that they was handling. I went places and I saw people that used cocaine, you know, and I have seen it before then.

Q. And this was in a lot of places? A. Yes. Around three or four years, yes.

Q. Well, now, this is before the transaction with Tillie you told the Court and jury now, did you not, that you went around a lot of places where there was narcotics? A. Well, listen, I didn't go around looking for narcotics. I just happened to see people using it and it would be around me, and I saw what it looked like.

Q. So that was when you decided this is a good business to get into, is that it? A. I didn't decide. It just happened. It was one of those things that just happened.

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Q. Did you say habit? A. No, happened.

Q. Jesse didn't approach you to get into the business, did he?

Mr. Starkey: Your Honor, I will object. I think the witness' testimony is clear in that regard.

Mr. Pogoda: It is unimportant.

Q. Now, Mr. Ellis, you got the package from Jesse and you came downtown, right? A. Yes.

Q. Where did you go with that package? A. Well, we came by, we stopped at the Woodside Hotel, and Tillie told me that he was going around 140th Street between Seventh and Eighth Avenue to a friend's house.

Q. When you left Jesse's house did you have an appointment to meet Tillie at the Woodside Bar, at the Woodside Hotel? A. I picked Tillie up at 225th Street where we went the first place and we came back downtown.

Q. So that Tillie was waiting for you at 225th Street when you picked up this package, right? A. He was in the bar waiting for me, yes.

Q. I ask you if you were not asked this question on di-

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rect examination and did not make this answer:

"Q. Now after you left Jessee's apartment, what did you do? A. I came back to the bar and picked up Tillie."

Now—

Mr. Starkey: Your Honor—
Mr. Pogoda: May I continue, Mr. Starkey?
The Court: Let him ask his question.

Q. Was this bar up at 225th Street or was it in Harlem? A. Would you mind repeating your question?

Q. Your answer was that after you left Jesse's apartment you went back to the bar and picked up Tillie.

Now, was Tillie in the bar at 225th Street or was in a bar in Harlem? A. He was in a bar at 225th Street.

Q. So that Tillie went up to 225th Street in a taxicab with you? A. Yes.

Q. Right? A. Yes.

Q. Did you give Tillie the package at 225th Street? A. I don't remember.

Q. Well, he already paid you for this package, isn't

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that so? A. Yes.

Q. And after paying you for the package and you picked up the package you did not give it to him in the taxicab on the way back? A. I don't remember.

Q. Or in the bar? A. I don't remember.

Q. Right. A. No, not in the bar.

Q. Now, you picked up the package for Tillie, am I right? A. Yes, sir.

Q. And you saw Tillie at 225th Street? A. Yes, sir.

Q. And you did not give him the package at 225th Street? A. I don't remember.

Q. You mean you don't remember whether you gave him the package or you did not give him the package at 225th Street? A. I don't remember where I gave him the package or whether I brought the package down in the cab.

Q. Well, now, your purpose in going up to 225th Street

was to buy the package for him, wasn't it?

Mr. Starkey: Your Honor, I submit that this area has been well covered and that this is repetitious.

The Court: Do you remember where you gave the package to Tillie?

The Witness: Not exact, your Honor.

The Court: Well, it was somewhere between 225th Street and where? Where did you go with Tillie after you left—

The Witness: We came to the Woodside Hotel.

The Court: Which is where?

The Witness: 141st Street and Seventh Avenue.

The Court: Where did you leave Tillie?

The Witness: I went—we went in the hotel and Tillie said "I forgot. I got to go around here on 141st Street." And we went around to 141st Street, me and Tillie, I don't who had the package at that time. I know when we got upstairs we had the package, one of us had the package.

The Court: When you got around to 141st Street?

The Witness: Yes, sir.

Q. So that you don't know whether you gave the package to Tillie at 225th Street or at the Woodside Hotel or at

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this house on 141st Street? A. I know the package was there at 141st Street. I don't know which place I gave it to him at.

The Court: He says he doesn't know which one.

Q. Now will you tell the Court and jury, if you will, Mr. Ellis, why you continued to be in Tillie's presence after you consummated the sale and delivery of this cocaine? A. Why?

Q. Yes. A. He told me to wait because Leon was coming by.

Q. When did he tell you this? A. In the Hotel he told me he wanted me to wait and go around to this house with him because Leon was coming around there.

Q. You didn't know about Leon until you got back with the package? A. I didn't understand this?

Q. You didn't know about Leon until you got—came back to the Woodside Hotel, right? A. No.

Q. And then you left the Woodside Hotel and went to this house at 141st Street between Seventh and Eighth Avenue? A. Yes.

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Mr. Carluccio: If the Court please, may we have a late afternoon recess for the benefit of the stenographer if not the—

The Court: Maybe counsel is about finished his cross-examination.

Mr. Pogoda: I don't think I will be through with him this afternoon yet, Judge.

The Court: All right, we will take a five-minute recess.

(Recess.)

(Jury present.)

LEON ELLIS resumed.

By Mr. Pogoda:

Q. Now you went around 141st Street between Seventh and Eighth Avenue with Tillie, right? A. Yes, sir.

Q. And you waited there for Leon? A. We went up to the apartment and waited.

Q. That is where you waited for Leon? A. Yes.

Q. How long? A. 15 or 20 minutes.

Q. Between the time you left 225th Street and the time that Leon came into this apartment, was Tillie with you

all the time? A. Yes.

Q. Did he make any telephone calls? A. No, I didn't. I don't remember him making any.

Q. He was with you, am I right? A. Yes, we was in the same room.

Q. Right. No. I am now speaking from the time you got the package from Jesse Colson and you met Tillie in a bar, he was with you until Leon came into the apartment at 141st Street and Seventh and Eighth Avenue? A. Yes.

Q. He didn't make any telephone calls during that period, did he? A. I don't remember.

Q. Well, did he or did he not?

Mr. Starkey: Objection.

A. I don't remember.

The Court: He said he doesn't remember. Proceed.

Q. You don't remember at all what happened as far as Tillie is concerned from the time that you left the bar?

Mr. Starkey: Your Honor—

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Mr. Pogoda: Withdrawn.

Q. In any event you don't remember every detail between the time you left 225th Street and the time you got into the apartment at 141st Street between Seventh and Eighth Avenue, right? A. Yes, one incident I remember. I remember Tillie opening the package and said he was going to get him a little freeze.

Q. Where did he open the package? A. In the room where we was?

Q. You mean at 141st Street? A. Yes.

Q. That is while you were waiting for Leon to come? A. Yes.

Q. You had no appointment with Leon, did you? A. No.

Q. Tillie didn't mention Leon to you, did he? A. Until we got back to the Woodside Hotel.

Q. That is the first time he mentioned Leon? A. Yes.

Q. Did you ask him who Leon was? A. No.

Q. You were not afraid of a pinch yourself with the stuff? A. You are always afraid of a pinch, yes.

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Q. As a matter of fact, from the very moment you picked up the stuff until you get rid of it you are worried about a pinch, isn't that so? A. Yes.

Q. And being worried about a pinch you went from 225th Street in a bar to the Woodside Hotel and around the corner to 141st Street between Seventh and Eighth Avenue and you were with the stuff waiting for Leon to come? A. Me and Tillie was together.

Q. Yes, with the stuff? A. Yes.

Q. Now, what did you do at the Woodside Hotel? A. What did I do?

Q. Yes. A. Well, I went to Tillie's room and Tillie opened the door and he said "I got to go around to 141st Street, come on."

Q. You mean you just walked into Tillie's room and then when you got into Tillie's room he said "I have got to go to 141st Street between Seventh and Eighth Avenue"? A. Yes, right around the corner from the hotel.

Q. Did he change his clothes? A. No.

Q. Did he do anything while he was in his room? A. No.

Q. How long did you stay in the room? A. He just opened the door and looked and said "I got to go around to 141st Street."

Q. You were worried about a pinch then too, weren't you? A. You are always worried about a pinch.

Q. You had already gotten your money and delivered the package? A. Yes, if you call it that. I got cab fare. I got five or ten dollars, something like that.

Q. How long had you waited at 141st Street before Leon came in? A. About 15 or 20 minutes.

Q. Did you know Leon when you saw him? A. Yes.

Q. Did you call him by name? A. (No response.)

Q. Did you say "How are you Leon?" A. When he came up?

Q. Yes. A. No. I just said "Hi."

Q. How long did you know him? A. Oh, I had been

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seeing him around eight or nine years, ten years.

Q. How long had you been talking to him? A. Not talking to him. I used to speak to him and say hello.

Q. Well, where would you see Leon? A. Where would I see Leon?

Q. Yes. A. In the street.

Q. Did you know what business he was in? A. No.

Q. You knew nothing about him? A. Not as far as his personal life, no.

Q. You knew him about eight or nine years? A. Yes.

Q. And you knew Colson for how long before you heard he was in the narcotics business? A. How long did I know him?

Q. Yes. A. Before I heard that he was in the narcotic business?

Q. Yes. A. I heard he was in the narcotic business before I knew him.

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Q. What year? A. It was '56, the last of '56.

Q. So that you knew Colson was in the narcotics business in 1956? A. I didn't know he was in the narcotics business. I heard that he was in the narcotic business.

Q. When did you meet him for the first time? A. I didn't understand you.

Q. When did you meet him? What year? A. '57.

Q. Now tell us again, if you will, Mr. Ellis, what happened in this room, this apartment building at 141st Street between Seventh and Eighth Avenue? A. What happened in the room?

Q. Yes. A. (No response.)

Q. After Leon came in? A. Well, he asked Tillie if he could get the stuff and Tillie said "Yes."

Q. I didn't hear you. A. He asked Tillie did he get the stuff and Tillie said "Yes," and Tillie gave him the package, and he measured it. And he told me that it was a little short.

Q. Who measured it? A. Leon.

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Q. With what? A. A spoon.

Q. Was this in the kitchen? A. No. I don't know whether it was in the kitchen or in the room. He was in a small room, I remember that.

Q. Did they have silverware in there? A. I don't remember.

Q. What kind of a spoon did he use? A. A teaspoon.

Q. Where was the lady? A. I don't know. She was up in the room, I guess.

Q. In the same room? A. No.

Q. All right. Now after he measured it he said it was a little short, right? A. Yes.

Q. How much short was it? A. He just said "A little short."

Q. You were the salesman, weren't you? A. I didn't even know how to measure it then.

Q. You had been around narcotics before this, am I right?

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Mr. Starkey: Objection.

The Court: We have been over this before. Just ask him the question you want to bring out. Don't keep repeating because I am going to sit here for a long time. In fact I might go into night sessions beginning tonight.

Q. Mr. Ellis, when Leon said it was short didn't you ask him how much short? A. No.

Q. Do you know how many spoons there were? A. No.
Q. You were there, were you not? A. Yes.
Q. This is the stuff you sold, wasn't it?

Mr. Starkey: Objection to these repetitious questions, your Honor.

The Court: I will sustain the objection. Let's get on with the cross-examination, please. Make your points and let the witness go.

Q. Now Ellis, at that point was anything said about making up the shortage? A. Leon said "It's a little short."

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Q. What did you say? A. And Tillie asked me could I get in contact with my man and I told him "No, not tonight," and Leon said "Just forget about it."

Q. What happened then? A. And Tillie asked Leon—he asked Leon where he was going when he left. Leon told him he was going around 36th Street. And Tillie suggested, "Why don't you let Schoolboy take it around for you." and he asked me would I. I said "Yes." and he gave me $15. I took it around to 136th Street.

Q. All right. Now who left the house at this point, first? Who left the house first? A. Who left the house first?

Q. Yes. A. I don't remember.

Q. Well, now, were you told who to bring it to at 136th Street? A. Yes, I was to see him at 136th Street.

Q. Who said this? A. Leon.

Q. Did you go to 136th Street? A. Yes.

Q. Where in 136th Street were you supposed to go? A. Between the block. Around the club.

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Q. You were familiar with 136th Street? A. Yes, I used to go by there on occasion.

Q. How often would you be on 136th Street? A. I wouldn't know how often I would be there.

Q. Can you tell us what type buildings there are on 136th Street? A. Well, there is mostly private houses on 136th Street.

Q. Any public buildings there? A. I wouldn't know.

Q. You wouldn't know? A. I don't know.

Q. Is there a Post Office on that block? A. No.

Q. Is there a library on that street? A. Yes.

Q. Are there any undertaking parlors on that street? A. Yes.

Q. A good many of them? A. Yes. A few. I don't know exact how many there are.

Q. Almost every house on the street across from the library is an undertaking establishment, isn't that so? A. I would say it would be four or five undertakers in the

block. I don't know how many there are.

Q. Now, what side of the street were you supposed to meet him? A. I don't know. In the block.

Q. Did you know what kind of a car to look for? A. No.

Q. And that is a pretty long block from Lenox to Seventh Avenue, isn't that so? A. Well, it's pretty fair.

Q. And you were carrying this cocaine all the time? A. Yes.

Mr. Starkey: Is that a question, your Honor?

The Court: He said "Yes." Let's proceed.

Q. That is down the street from Harlem Hospital, isn't it? A. No.

Q. Well, isn't Harlem Hospital at 136th Street and Lenox Avenue? A. Yes.

Q. And you were right down the street from Harlem Hospital? A. I was up the street from Harlem Hospital.

Q. Well, you were on the other side of the street. You were on the same street as the hospital is on?

—894—

Mr. Starkey: Your Honor, I am not clear as to who is testifying on this point.

The Court: Let's proceed to something else. I assume he is finished with that.

Q. Now where did you get the $15? Who gave you the $15? A. Leon.

Q. In the house? A. Yes.

Q. Well, now, when you were in Mr. Starkey's office were you asked this question by Mr. Starkey and did you make this answer:

"Now did there come a time in the early months of 1958 when Jesse Colson asked you if you knew of anyone who could be a customer for cocaine he was importing? A. I heard that he was dealing and I asked him."

Now was it in 1957 or was it in 1958?

Mr. Starkey: Your Honor, I think the original question was—

Mr. Pogoda: I haven't finished my question.

The Court: Finish it.

Q. Was it in 1957 or was it in 1958—

Mr. Starkey: I object to the form of the question

—895—

at this point even if he is not finished.

The Court: That is overruled. Finish the question.

Q. —that you first spoke to Jesse Colson about working for him?

The Court: Now what is the objection?

Mr. Starkey: The objection is, your Honor, I object to the form. The question was were you asked this question and did you give this answer, and the witness has not yet answered that previous question. It is at least a double question.

Mr. Pogoda: Then I am sorry. I will ask the question over.

The Court: I think we have been over this many, many times.

Mr. Pogoda: No, we have never been over it.

The Court: No, we have been over this many, many times and we are going to sit here until we finish with this witness.

Mr. Pogoda: I have no objection to that.

Q. Were you asked that question and did you make the answer I read to you? A. Would you mind reading it over again, please?

Q. "Q. Now did there come a time in the early months of

1958 when Jesse Colson asked you if you knew of anyone who could be a customer for cocaine he was importing? A. I heard that he was dealing and I asked him."

Now was that question put to you by Mr. Starkey and did you make that answer? A. I made that answer but it was a mistake at that time. It was a mistake in that year

and I thought about it and I told Mr. Starkey that it was wrong. It was in '57.

Q. Now when did you tell Mr. Starkey you were wrong? A. I don't know exact when. When I looked at that thing there.

Q. How long after this first delivery to Tillie did you have the second contact with anyone working, while you were working for Jesse. A. What do you mean by contact?

Q. The next sale you made. A. Well, the next sale was to Leon.

Q. And how long was that after the first sale? A. I don't know. It was the last of—it was the last of December, around the first of January, somewhere in there.

Q. When did you make that first sale to Tillie again?

—897—

What month was that? A. It was around about the last of November or the first part of December, in that area.

Q. So about a month later— A. In that area of time. I don't know exact what date but that is as close as possible.

Q. In that intervening period you did no other narcotics business? A. No.

Q. Although you had been seeing Jesse right along, isn't that so? A. Yes.

Q. Did Jesse tell you whether or not he had stuff to sell? A. No.

Q. You were seen riding around with Jesse all this time, am I right? A. I don't know. Was I?

Q. Didn't you become fast friends with Jesse after this one deal? A. I don't know.

Q. You mean you never became close friends with Jesse? A. Well, I don't know what you mean by friends, close

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friends.

Q. Well, you were riding together, talking to each other on the telephone, he lent you money to pay bar bills, lent you money to go attend your mother's funeral; didn't you become friends with Jesse?

Mr. Starkey: Objection to the form of the question, your Honor.

The Court: Let's say he became friends with Jesse. Let's move on to something else.

Q. Did you ever become a partner of Jesse's? A. No.

Q. Well, now you were sharing in the profits, were you not?

The Court: I think he testified he was getting 10 per cent of his sales. Now let's get on to something else.

Q. Well now, how did the second sale come about? A. Well, Jesse asked me, at least he told me, he said "I have some coke left." He said "If you can get a person that wants to buy it I would like to get rid of the whole lump sum." I told him "I would look around and see if I could find anybody who was interested."

Q. Well now, you knew you made the first sale to Leon, am I right? A. No.

Q. This sale to Tillie— A. I got the money from Tillie.

Q. You delivered the package to Leon, am I right? A. Yes, from Tillie's—me and Tillie were—

Q. You didn't give it to Tillie, you gave it to Leon at 136th Street?

Mr. Starkey: Your Honor, I object to that form.

The Court: Well, do you remember whether you gave it to Tillie or to Leon or which one?

A. I gave it to Leon on 136th Street.

Q. Now when Jesse spoke to you on this occasion you went back to 136th Street, am I right? A. Yes. I asked a few fellows around and I went to 36th Street and asked Leon—

Q. Where did you find Leon? A. At 136th Street.

Q. In what? A. In the block.

Q. In an automobile, walking on the street, in a house, where? A. I don't know whether he was in an automobile or in a house. I would always see him in that area around

136th Street.

Q. In front of any special building? A. I wouldn't say in front of any special building. He would just be in the block there.

Q. Well, would he be walking up and down the street, standing or sitting or what? A. He would be sitting in his car some time, and sometimes he wouldn't be.

Q. And you approached Leon sitting in his automobile? A. I don't know exact where it was.

Q. Where did you have the conversation with him? A. In 36th Street.

Q. In his car or on the street? A. I don't remember exact.

Q. Was anyone else present at the time? A. When I met Leon?

Q. Yes, when you discussed it with him. A. No.

Q. Well, what was said this time? A. Well, I asked— I told Leon that my man had a package of coke and that

he wanted to get rid of it in one lot, and Leon said, "Is it pure—is it pure?" I think it was.

—901—

Mr. Somers: Can't hear you, Mr. Ellis.

A. "Is it pure," and I said "I think it is." He said "How much is it?" I said "I don't know exact. I will check with Jesse and see how pure it is and is it pure and how much he wants for it."

Q. Was anything said about how much it weighed? A. No.

Q. You didn't discuss the first time that you spoke to Leon how much stuff Jesse had? A. How much did he have?

Q. Yes, or how much you had to sell. A. Well, this was later. It was later on. I told him that I would go to

Q. Do you remember being asked this question on direct examination and making this answer:

Jesse and ask him how much he got and how much he want for it.

> "Q. What did you say and what did he say? A. Well, I asked him, I said, 'My man has got a package of coke,' I said, and he said, 'It's approximately 12 ounces,' and I asked him was he interested in it, if I could get it for him."

Do you remember that question and that answer? A. Yes.

Q. That was true, wasn't it? A. Well, maybe the words,

—902—

the way I was speaking, it was true.

How I remember it at that time that was true.

Leon Ellis—for Government—Cross

Q. This is what you testified to yesterday morning? A. Yes. Do you want me to—

Q. You don't remember now what you said yesterday morning?

Mr. Starkey: Your Honor, I object at this point.

The Court: I think that counsel will concede that what you read is a transcript of the testimony, the reported transcript of the testimony from yesterday. So let's proceed.

Q. "Q. What did Leon say? A. Leon said 'Yes. I will take the whole thing if it's pure,' and I told him, I said 'I didn't know exactly how pure it was but I would see Jesse and find out how much it was and how much did he want for it.'

"Q. Did you talk about price and quantity with Jesse Colson? A. Yes."

Were you asked those questions and did you make those answers? A. Yes.

—903—

Q. Well, now, after you spoke with Jesse and came back, did you have a conversation with Leon? A. Yes, I think I saw him that following night, yes, sir.

Q. And what was said on that occasion? A. And I told him how much he wants and how much Jesse wanted for it.

Q. What did Leon say? A. He told me, he said, "Come by tomorrow night, okay, come by tomorrow night," the next night after dark, or something like that.

Q. And did you come back the next night after dark? A. Yes, sir.

Q. How much did you agree to take from Leon for this transaction? A. How much did I agree to take?

Q. Yes, how much did Leon agree to give you for the package? A. He didn't agree. I told him how much Jesse wanted for it.

Q. And he said "Come back tomorrow night"? A. Yes.

Q. "And then I will give you the money"? A. He didn't

—904—

say nothing about giving him the money. He just said "come by tomorrow night." I told him it was $5,000 and there was approximately 10 to 12 ounces, or similar like that.

Q. What happened after that? Did you come back the next night? A. Yes.

Q. Where did you see him? A. I saw him in 36th Street.

Q. What happened then? A. Well, he gave me $5,000.

Q. Did he say anything to you? A. Yes. He said "I am not going to trust anybody with my money any more because I don't do business like that. I am doing all the trusting," and he said "The next time I do business it's going to be from one hand to the other."

Q. Did he hand you $5,000? A. It was in a bag.

Q. Did you stop to count how much money it was? A. No.

Q. Did you ever tell Leon your name? A. My name?

Q. Yes. A. I don't remember.

—905—

Q. You were known to Tillie as Schoolboy, am I right? A. Yes.

Q. And this is the first time you actually had any business transactions with Leon, you say?

Mr. Starkey: I will object, your Honor. That is not the witness' testimony.

The Court: I sustain the objection. He just testified at length about the prior transaction so let's get on.

Mr. Pogoda: The transaction he testified was with Tillie.

The Court: He testified he gave the cocaine directly to Leon Aiken.

Q. This is the first time you had a direct transaction with Leon, isn't that so? A. Yes.

Q. This is the first time you approached him to do business with him? A. Yes.

Q. And now Leon did not know where you lived, did he? A. I don't know.

—906—

Q. You never told him, did you? A. No.

Q. You were known to Leon as Schoolboy, right? A. Yes.

Q. The only time you had been in his company before negotiating this transaction was up at 141st Street and Seventh Avenue, or in that house between Seventh and Eighth Avenue, isn't that true? A. The first time I had been in his company?

Q. In his company. A. I used to see him around.

Q. You passed him by on the street and you nodded and said "Hello." Did you ever have any business transactions with him before these? A. No.

Q. Had you ever been to his home? A. No.

Q. Did you know where he lived? A. No.

Q. Do you know or did you ever tell him where you lived? A. No.

Q. Based upon this relationship that you have just described Leon gave you $5,000? A. Yes.

—907—

Q. Did you make an appointment to meet again? A. Make what?

Q. Did you make an appointment with Leon as to where to meet? A. I was going to bring him back to the block.

Q. When? A. When I picked up the coke.

Q. Was this day or night? A. Night.

About 7:30 or 8 o'clock, around that time.

Q. A cold night, was it? A. Yes, it was fairly cold.

Q. Where did you go from there? A. I went to 140th Street.

Q. Whom did you meet there? A. Jesse.

Q. And did you drive down in Jesse's car? A. No.

Q. Where did you go? A. (No response.)

Q. How did you go? Where? A. I think it was by cab.

Q. Where did you go from there? A. To 94th Street.

—908—

Q. Now at 94th Street you met Icky there? A. Yes.

Q. Some women there? A. Yes. I didn't meet the women. I only met Icky.

Q. And you told us it was at that point that Icky said he had a customer for things and Jesse said you had—he had the money for the package, am I right? A. I didn't get that first statement.

Q. You tell us what happened in 94th Street. A. Well, when we got in the house, Jesse told Icky, he said, "Here is a man for the package. For the coke." And Icky said, "How much?"

Jesse said, "All of it."

Icky said, "You can't give him all of it because I got a man coming over. He wants some."

And he also said that we could cut it and almost double your money.

Jesse said, "Well, I got cash money in my hand." so he, thought a couple of seconds, and he said, "I didn't think about that." He said, "I tell you what we will do Schoolboy, I will give you half of it for your man and Icky can keep half of it for his man."

—909—

Q. Now when Icky said, "We can cut it and you can double your money," did you know what he meant by that? A. No.

Q. You did not know what he meant by cutting it? A. No.

Q. Did you ask him whether it was pure cocaine? A. (No response.)

Q. Did you ask him whether it was pure cocaine? A. Ask ho?

Q. Jesse. A. He told me it was pure.

Q. Did you speak to him about testing it? A. No.

Q. You knew nothing about testing it for purity and strength? A. No.

Q. Did you see him count out the money that you received? A. Not exactly. I saw him count the money on the bed.

Q. The money was given to you, isn't that so? A. Yes.

Q. That $5,000 was given to you? A. Yes.

—910—

Q. You were responsible for it to Leon? A. Yes.

Q. Didn't you want to make certain that there were $5,000 there? A. Well, Jesse always did that. He always did the counting of the money.

Q. This was only your second transaction with Jesse? A. Yes.

Q. So he only did business with you on the basis of $300 before? A. Yes, and he counted the $300.

Q. Wasn't $5,000 a lot of money to you? A. Sure.

Q. You were responsible for it, you knew that, didn't you? A. Yes.

Q. And yet you gave the money to Jesse to count? A. I gave the money to Jesse when I picked him up at 140th Street.

Q. Did you ever see the package you were to get for the $5,000 before you gave him the money? A. (No response.)

Q. Did you ever see this package you were supposed to

—911—

get for $5,000? A. No.

Q. And you parted with $5,000 without ever seeing the package you were to get for $5,000 which was not your money? A. Yes.

Q. Now you say the stuff was divided, right? A. Yes.

Q. It was split up? A. Yes.

Q. How many spoons did Jesse count out? A. Jesse didn't count it out. Icky counted it out.

Q. How many spoons did he count out? A. I don't remember.

Q. Well, this was the package you were going to bring back to Leon, isn't that so? A. Yes.

Q. You had the money for this package? A. Yes.

Mr. Starkey: Your Honor, I object to the repetitious question.

The Court: Sustained.

Mr. Pogoda: I am sorry.

The Court: All right, sir.

—912—

Q. Now how many spoons were you to get for $5,000? A. I don't know.

Q. Well, now, how many spoons did you get for $2,500? A. I don't know.

Q. You were there when Icky was measuring this out, weren't you? A. Yes.

Q. Didn't you count to see that you were getting an honest count? A. No.

Q. You knew you had short-changed Leon on the first time? A. I didn't know it.

Q. Didn't Leon tell you it was short? A. Yes.

Q. You didn't want to short-change this customer a second time? A. I didn't have anything to do with the short-changing. I wasn't measuring.

Q. Well, the point is if you didn't give Leon an honest count you would lose him as a customer and this was your only customer, wasn't it? A. Yes.

—913—

Q. At that time did you know how much commission you were going to get? A. No.

Q. You came to Jesse with a $5,000 transaction, and at that time you did not know how much your cut was going to be? A. No.

Q. Were you interested? A. Sure. I thought he would give me a responsible amount for transacting this deal.

Q. You were not going to get into this business with a $5,000 transaction for just small change, were you? A. I didn't understand the question.

Q. Well, you were not in this business just for pennies, were you, with a $5,000 transaction? A. Well, I was realizing for Jesse honesty to give me a reasonable amount of what he thinks right for me transacting this deal for him.

Q. Did you ever know how much Jesse was making on that $5,000 transaction? A. No.

Q. Didn't you think if you knew what he paid for it that you would then determine whether it was a worthwhile risk for you to take?

—914—

Mr. Starkey: Objection as to form.

The Court: I think you are arguing with the witness now. He says he didn't know. He trusted Jesse's honesty to give him what it was worth. I don't know what else you can make of it.

Q. Well now, you brought back the coke, you say, to Leon, and that was at 136th Street? A. Yes.

Q. Now, do you remember being asked this question and making this answer when you were questioned by Mr. Starkey on April 25, 1961, page 2, about the middle of the page.

"Q. Where did you deliver to Leon? A. In front of the Woodside Hotel between 141st and 142nd Street.

Q. On Seventh Avenue? A. On Seventh Avenue."

Now, were you asked those questions and did you make those answers? A. That was a mistake.

Q. A misstatement? A. Yes. That was a mistake, and I correct my—I tried to straighten it out.

Q. You know as a matter of fact?

—915—

Mr. Starkey: I object to his interrupting the witness.

A. I thought this was about the first time that I did business with Tillie, but that was a mistake. It was around the corner.

Q. All right. Now on June 6, 1961, two weeks ago, were you asked did this take place in Mr. Starkey's office in front of this woman stenographer.

"Q. (Mr. Starkey) I show you Exhibit 1 and ask you if you have read this transcription of the questions and

answers that I asked you and you gave on April 25th? A. Yes.

"Q. Is that a true and accurate transcription of the questions and answers on that date? A. Yes."

Now, did you tell him on June 6th, were those questions asked you and did you make those answers? A. I don't remember.

Q. Now you say that this did or did not occur? A. I don't remember.

Q. But if it is presented by Mr. Starkey and represented by Mr. Starkey as having occurred, would you say that it happened? A. I don't remember.

—916—

The Court: Wait just a minute, please. I think Mr. Starkey will concede that that transcript is accurate.

Mr. Starkey: The question is is that a true and accurate transcription of the questions and answers on that date, that is to say April 25, 1961, and that the witness answered yes, I will concede that.

Q. You know you never made any deliveries to Leon on Seventh Avenue in front of the Woodside Hotel? A. I told you that that was an honest mistake.

Q. You didn't make deliveries to anyone on Seventh Avenue in front of the Woodside Hotel? A. That is where me and Tillie got out of the car at and went into the hotel and he said he had to go around this house and wait for Leon to come up.

Q. Now, did there come a time again when you negotiated another deal for Jesse Colson? A. (No response.)

Q. Was there a third transaction that you negotiated for Jesse Colson? A. Yes.

Q. When was that? A. That was with Duke.

—917—

Q. That was what? A. That was with Duke—

Q. I am asking you about Jesse Colson. A. Would you mind repeating your answer, please?

Q. You testified to two transactions with Jesse Colson. I am asking you for a third transaction with Jesse Colson. When did that take place? A. I don't understand the question.

The Court: He wants to know, you had a $300 transaction, and then you had the $5,000 transaction cut down to $2,500.

The Witness: That's right, sir.

The Court: Did you have another transaction, and if so, in what amount, and with whom, for Jesse Colson.

The Witness: That was me and Jesse. That was when I directly delivered the stuff—

Q. No, when did you negotiate, or if you did negotiate.

The Court: Wait just a minute. He is trying to get clear in his mind what you are talking about.

When was this next transaction?

Q. With Jesse Colson and Leon. A. It was—

The Court: Do you remember what the transaction

—918—

was about?

The Witness: Yes.

The Court: How much was involved?

The Witness: It was a kilo.
The Court: When was that?
The Witness: This was the last of September.
The Court: Of what year?
The Witness: '58.
The Court: All right, take the witness.

Q. So that between January of 1958 and September of 1958 you had no transactions with Leon for Colson, am I right? A. No.

Q. Had you seen Leon between January of '58 and September of '58? A. Yes.

Q. When? A. I don't know when. I saw him in the street.

Q. Did you talk to him about making any more purchases for you? A. Talk to him?

Q. About selling him some more stuff. A. Maybe. I don't remember exactly.

Q. He was a good customer, wasn't he?

—919—

Q. And did you try to promote any business with him? A. Yes. I don't remember. I don't remember.

Q. You mean for eight months you did not look to push business with Leon? A. Well, I heard that the stuff he was expecting got caught.

Q. Who did you hear that from? A. I heard that from him.

Q. From who? A. Jesse Colson.

Q. When did you hear that from him? A. He told me a little after the load of coke got caught on the ship, was found on the ship.

Q. When was this? A. I think it was in May, around in there, around in that time.

Q. So that between January and September Colson was without any business?

Mr. Starkey: I will object.

A. I don't know.

The Court: He said he doesn't know.

Q. Did you see Colson often during that period? A. Yes.

—920—

Q. And the people uptown talked about Colson as the man that is in the narcotics business? A. Well, I have heard that, yes.

Q. Didn't you continue to hear it between January and September? A. Well, we was around together pretty close then.

Q. That's right. He had a reputation of being a businessman, a narcotics man, am I right? A. Well, what the people that he did business with—

Q. Well, did you tell us before Mr. Ellis, that on the street there everybody knew Jesse to be the narcotics man and you were traveling around with him? A. I don't think everybody knowed him because if everybody knowed it he wouldn't have had the coke.

Q. Quite a number of people knew him? A. Maybe so.

Q. And pointed him out to you as the coke man? A. Not point him out. I heard it.

Q. You heard that, am I right? A. Yes.

Q. And between January and September of 1958 he had no coke to sell?

Leon Ellis—for Government—Cross

Mr. Starkey: Objection. Argumentative and calls
—921—
for a conclusion.

The Court: I will sustain the objection. He has already answered it.

Q. Do you know of any sales made by Colson between January and September of 1958? A. I don't know.

Q. Well now, tell us how you came to know about this September transaction. A. I came to know it because Jesse told me he was expecting a shipment in.

Q. When did he tell you that? A. I don't know. It was around June or July. He made a telephone call from my godmother's telephone and he said he was calling the people in Chile and he was expecting to get a shipment in pretty soon.

Q. Before this time did you know where Jesse was getting his stuff from, what country? A. No.

Q. So that from September or October or in the fall of 1957 until the fall of 1958 you did not know that the source of supply was Chile? A. No.

Q. You had been with him often during that period,
—922—
right? A. Yes. I didn't even know who was bringing it in.

Q. How long after this telephone call was made to Chile did the stuff arrive? A. I don't know. He made the call some time in the last of May or June, the stuff arrived the last part of September.

Q. So that from the time of the call and the time of delivery was approximately four months? A. (No response.)

Q. Right? A. I don't know exactly.

Q. Was Jesse around during this period? A. I don't know whether he made a couple of trips or not. I don't know.

Q. You mean you don't remember if you saw Jesse during that period of four months? A. Well, I seen him but I don't know whether he made a short trip in between that time because he was going on the ship and he was doing coastwise duty right around the ports around New York.

Q. You didn't see him very often during that period, did you? A. I saw him. He was in and out.

Q. Now at this time that he was shipping in and out

—923—

did you have the stash on Park Avenue? A. No.

Q. Well, where was it stashed? A. I didn't have any. I didn't know where it was stashed.

Q. When for the first time did you find out about a stash? A. It was when he stashed it there.

Q. When? A. I don't know. The last—around in October.

Q. Was that after the second kilo shipment or the first kilo shipment? A. After the second.

Q. You were present when the first kilo shipment came in, am I right? A. Yes.

Q. Did you know it was coming in that day? A. Yes.

Q. And that was in September? A. Yes.

Q. And Jesse told you about it? A. He called me up. He had told me previously that he was expecting a shipment in and he wasn't going to call me no more until the day the shipment was supposed to arrive, and when he called

—924—

downtown, in other words, when I got the message, if I get the message, come to the phone and just say "Hello, how do you feel," hang up, and come on up his house.

Leon Ellis—for Government—Cross

Q. Where were you to get the telephone call? A. In Carter's Corner.

Q. Was this the same time you were supposed to be working in the cleaning store? A. Well, I was in and out of there. I would go to the cleaners during the day. In other words, I am just doing anything that I want to do around the cleaners. In other words, I worked just like I wanted to work and when I was around there, I didn't consider this as a job.

Q. The cleaning store was a front for your other business? A. No.

Q. It wasn't a regular job though, was it? A. No.

Q. And you got the message and you came up to Jesse's apartment? A. Yes.

Q. And while you were there what happened? A. Well, while I was there Jesse was looking out the window, looking could he see the people and he went out in the yard,

—925—

and he saw the old lady out in the yard, and he told her to come in.

Q. How many women came in? A. Two.

Q. Then tell us everything that happened from the time the women came in until the time you went out. A. Well, I can't tell you everything—

Q. Everything that you remember. A. But I will tell you as close as I can.

Well, when Jesse opened the door for them, they were speaking in Spanish, and they came into the living room, sat down, and the elderly lady she opened a large bag and started giving Jesse these packages of cocaine.

Q. How many packages did he get? A. I don't remember. And he was giving them to me. I was taking them into the room, unsealing them and putting them in jars.

Q. Up until this time you had never made a test on cocaine, am I right? A. Repeat that, please.

Q. Until this very day you had never made a test on cocaine, did you? A. Until this very day?

—926—

Q. Yes. A. Yes, I have made a test on cocaine.

Q. Well now, you told us, if I may review, that the first package you received from Jesse was wrapped. A. (No response.)

Q. The second time it was divided by Icky—

Mr. Starkey: I will object to this procedure, your Honor.

The Court: Well, I think that there is confusion anyway between what your question was and what the answer was.

Let me ask you this: You described in your testimony that you made a freeze test by putting some on your gums.

The Witness: That's right.

The Court: When is the first time that you can remember that you made a freeze test by putting it on your gums, about when?

The Witness: This was the last shipment.

The Court: That was the last shipment.

The Witness: About the first of October.

The Court: All right. Take the witness.

Q. So on this particular occasion, the first kilo, you had never made any tests with cocaine, am I right? A. Yes.

—927—

Q. You never tasted it, you never used it? A. I have tasted it, yes, sir.

Q. When did you taste it? A. Just—

Q. When? A. In the apartment. I was taking it out of the bags, the cellophane bags, putting it in the car, and it was all on my hands, and the fumes would almost make you sick from just the fumes alone, and I was tasting it and it was bitter.

Q. You were tasting it as you were emptying the bags? A. I wasn't tasting as I was emptying the bags. I have tasted cocaine and I did taste cocaine there at that time.

Q. Is that the first time you tasted cocaine? A. I don't know exactly.

Q. You don't know if you tasted cocaine before this day? A. No, I don't.

Q. You didn't know what cocaine tasted like, did you? A. At what time?

Q. This time that you are telling us when the kilo came in. A. No, not before I didn't.

Q. Well, now, who told you it was cocaine? A. Jesse.

Q. Was that while you were tasting it? A. No.

Q. Did he taste it? A. He was sniffing it, freezing it, smoking it. He said, "This is good cocaine." You talk about it while he was doing it.

Q. Tell us what else happened that day? A. What else happened that day?

Q. Yes. A. So Jesse gave me a sample and he told me to take it to Leon.

Q. Now, did you leave the house before the women left the house? A. I left the house before the women left the house.

Q. Did you see any money pass between Leon and the women? A. No.

The Court: I think you are confusing the question.

Q. Jesse. I am sorry. Between Jesse and the women.

—929—

A. No.

Q. Did you know how much money Jesse needed to pay the women? A. No.

Q. Did you ever discuss with Jesse how much this shipment cost? A. No.

Q. Did Jesse ever discuss his finances with you at this time? A. No.

Q. Did later find out from Jesse how much he paid the women? A. No.

Q. Did you later find out from Jesse where he got the money to pay the women? A. (No response.)

Q. For this shipment. A. Yes.

Q. Where? A. In other words, the first kilo to Leon.

Q. You mean you first took the sample, went to Leon, negotiated the deal, arranged for the delivery of this cocaine, obtained the money from Leon, brought it back to

—930—

Jesse, Jesse then paid the women? A. No.

Q. How did it go? A. How did it go?

Q. Yes. A. I took the sample to Leon, and gave him the sample and told him, Jesse said everything was all right. He said, "See me tomorrow night because I got to get up some money," or something like that. And I told him okay. So I told Jesse what Leon said, and about the next night I went by and asked Leon what is happening. He said he want to see Jesse, and I told Jesse to go by and see Leon, and Colson arranged the deal, how much was being paid.

Q. Now, how many days was that after the women had

brought the stuff in? A. It was four or five days.

Q. Now, do you know where the women were during these four or five days? A. No.

Q. Had you seen them during the four or five days? A. No.

Q. Had you ever discussed with Jesse whether or not he paid the women for the stuff? A. No.

—931—

Q. Well, now, after Jesse Colson arranged the deal, what happened? A. Well, he told me the next night, or the following night, that he was going to make a move, you know, and he came downtown, he got me, so I went up his house—

Q. You mean he came from the Bronx, 225th Street down to 140th Street, picked you up, and brought you back to 225th Street? A. No. He came down in the afternoon. We was riding around. We were going to make the move that night.

Q. You mean you spent all that day together? A. No, not all that day. He came down in the afternoon. We was riding around downtown, and we was in the car and we was going to make the move that night. But about 7:30 or 8 o'clock we went and picked up the coke.

Q. Where did you go? A. We went up to 225th Street, Jesse's house.

Q. Did he have it stashed in his own home? A. Yes.

Q. Now was the stuff measured or weighed in your presence? A. No.

—932—

Q. Was it ever weighed or measured in your presence? A. Yes.

Q. How much did it weigh? How much teaspoonfuls? A. I don't know.

Q. And what was the arrangement? How was it going to be delivered? A. Me and Jesse was going to deliver it.

Q. Both of you? A. Yes.

Q. How big a package was it? A. A package like this.

Q. How was it wrapped? A. In a bag, a brown bag.

Q. And where did you go from 225th Street? A. We went to 136th Street.

Q. Tell us what happened at 136th Street? A. We went to 136th Street, we left the car on Seventh Avenue, walked down 36th Street and as we was just about in front of the club, Leon was parked there, and we went over to the car, me and Jesse, and Jesse told Leon, he said, "Everything is all right." Leon said, "You got the stuff?" he said, "Yes." so he nodded and said, "Give it to Mersh." Mersh

—933—

was standing right in front of the club and I gave him the bag.

Q. Did you know Mersh before? A. I had seen him.

Q. Ever spoken to him before? A. Yes.

Q. About narcotics? A. No.

Q. Did you know that Mersh knew Leon? A. Did I know that he knew Leon?

Q. Yes, did you know that Leon knew Mersh or Mersh knew Leon? A. I thought he did. I seen them talking.

Q. Do you know what Mersh does for a liivng? A. No.

Q. Did you ever know him to work? A. No.

Q. What sort of a car is it that you went over to on this occasion? A. Well, I can't describe the car.

Q. What is the color of the car? A. I don't remember.

Q. What time was this? A. About 8:30 or 9 o'clock, somewhere in that time.

Q. You still had Daylight Saving Time? A. I don't

—934—

remember.

Leon Ellis—for Government—Cross

Mr. Carluccio: Your Honor, if the Court please, may we be advised as to what time the Court will recess. Many of us have wives and families who are preparing supper I imagine at this hour and we would like to know—

The Court: At the end of Mr. Pogoda's cross-examination. Go right ahead.

By Mr. Pogoda:

Q. Now, Mr. Ellis, you saw Leon's car the afternoon that you made the delivery to him in his car at 136th Street? A. What?

Q. The afternoon you made the first delivery with Tillie, wasn't Mr. Leon in his own car? A. I don't remember.

Q. Well, did you make a delivery to Leon in the automobile? A. I think he was in his automobile. I think he was.

Q. You are not sure now whether the first delivery was in an automobile? A. Well, I remember that it was on 36th Street but I don't remember direct whether he was in the car or on the street.

—935—

Q. Well now, this second delivery, was that in the automobile or was that in the car, in the street? A. Well, I had the jar, and I handed it to Mersh. It was in the street.

Q. And the second delivery was the time you delivered half the package and you returned the $2,500, isn't that so? A. (No response.)

Q. That first sale was for $300, right? A. Yes.

Q. The second sale was supposed to be for $5,000? A. Yes.

Q. And it was only $2,500? A. Yes.

Q. Now did you give the $2,500 and the package while he was in the street or while he was in the automobile? A. While he was in the automobile.

Q. So now you saw the automobile on that occasion, isn't that so? A. Yes.

Q. Now you saw this automobile on the third occasion, right? A. I don't remember.

—936—

Q. Well, now, did you tell the Court you saw Leon at 136th Street often? A. Yes.

Q. In his car, on the street? A. Yes.

Q. Am I right? A. I don't go around looking to see the color of the cars, you know.

Q. You mean you saw this car so many times and you can't tell us the color of this automobile? A. No, I can't.

Q. The make of the automobile? A. No.

Q. Did you ever sit in this automobile? A. Yes.

Q. What is the color of the upholstery? A. I don't know.

Q. None of the things about the automobile ever struck your eye? A. When you have got cocaine you don't think about no automobile.

Q. Well, you want to make sure that you get in the right automobile, don't you? A. The person—that is one you are interested in.

—937—

Q. Well, you would look to see if it was a government automobile or a police car, wouldn't you?

Mr. Starkey: I submit that counsel is arguing with the witness at this point.

The Court: I sustain the objection. Let's get along with the cross-examination, please.

Q. Well, now, you delivered the package to Mersh, right? A. Yes.

Q. Where was he with relation to the automobile? A. Where was he?

Q. Yes. A. He was, I would say, about this distance to there in front of the club, from the sidewalk to the front is a little step up and as you go down to the club he was there.

Q. How far from the automobile? A. I would say about a couple of feet. I wouldn't say a couple of feet. I would say about from this distance to this jury here (indicating).

Q. And how many men were standing there? A. I don't know.

Q. More than one? A. I don't remember.

—938—

Q. How do you know when Leon said, "Give it to Mersh," that you were giving it to the right person? A. He pointed to him. I remember him calling him Mersh around throughout the block and I knew who he meant by Mersh.

Q. You didn't live on 136th Street, did you? A. No, I didn't.

Q. Does Mersh live on 136th Street? A. I don't know where he lives at.

Q. Now after you delivered it to Mersh what did you do? A. I kept walking.

Q. Where did you walk to? A. Carter's Corner.

Q. Did you see Jesse later? A. Did I see him later?

Q. Yes. A. Yes.

Q. At his home? A. No.

Q. Where then? A. He picked me up at the bar and we went up to his house.

Q. Well, now, at this time, when you arrived at the

—939—

house, did you count out the money? A. Yes.

Leon Ellis—for Government—Cross

Q. How much was it? A. I don't know exactly. I thought it was $14,000 and Jesse said later that it was 12,000. I don't know exactly how much it was.

Q. Well, there is a big difference in what was due you whether it was 12,000 or 14,000, right? A. Well, yes. The way his little black book was it wouldn't make any difference. It would be back again anyway.

Q. You mean you were relying on Jesse's honesty to give you what was fair? A. Yes.

Q. Now before this sale was negotiated did you ask Jesse how much you would get out of it? A. No. He told me.

Q. He told you what? A. He told me that he was going to give me 10 per cent.

Q. This was when? A. When I saw the first big shipment, when it first came in.

Q. Then between January and September you didn't

know at all what percentage you were going to get on any future sales? A. No.

Q. Now, do you know whether the sale to Leon that you have told us about was the whole package brought in by the two women? A. Whether I knew or not?

Q. Yes. A. No, I didn't know.

Q. Did you weigh or measure it at all? A. No.

Q. Now, when you came back to the house with the $12,000 was the woman there? A. No.

Q. Did you see the women again or either one of the women again until the second delivery was made? A. I didn't see either one of them until the second delivery was made.

Q. Now, between the first and second delivery did you

ever speak to Colson about paying the women for the delivery of the merchandise? A. No.

Q. Do you know whether the merchandise was delivered to Colson on consignment? A. I don't know.

—941—

Q. Now, after the first delivery of the kilo you did have some conversation with Colson about the quality of the stuff, am I right? A. After the first?

Q. Yes. A. No.

Q. There was no question about the quality of the stuff? A. Well, it was good quality. He told me the last time, the last was like garbage, he said.

Q. Now when did Jesse give you the money, your cut? A. When he got finished counting it.

Q. Now did you see Jesse again after that? A. Yes. I was seeing him pretty often.

Q. After he gave you your cut? A. Yes.

Q. Did he still ask you to look for customers? A. He didn't ask me. I know that on my own.

Q. Now did you make any sales to anyone but Leon? A. During that time?

Q. At any time. A. No.

—942—

Q. Did you stop to think whether or not you sold stuff to anyone or don't you know whether you did or not? A. I had to think.

Q. I ask you this, Mr. Ellis: Did Mr. Starkey question you about sales to anyone but to Leon? A. (No response.)

Q. At any time. A. Yes.

Q. What did you tell him? A. I told him no.

Q. Did you tell Mr. Murphy that the only one you sold to was Leon? A. He didn't ask me that.

Q. Did Mr. Murphy ask you any questions? A. Yes.

Q. What did he ask you? A. He asked me a few questions. I don't remember.

Q. You don't remember? A. No.

Q. You are not confused, are you? A. I don't think I am.

Q. Were you ever in Mr. Murphy's custody or presence without the presence of Mr. Starkey? A. Yes.

—943—

Q. How many times? A. I don't remember. A few times.

Q. And all Mr. Murphy ever did was to show you the picture of Leon and some of the other men? A. Well, he showed me a lot of pictures.

Q. Now, did Mr. Murphy or anyone else say to you, "We have got to get this man"? A. No.

Q. Did they ever say anything to you which led you to believe that your testimony as far as any of these defendants is very important? A. No.

Q. You were merely coming in to help the government see justice done?

The Court: Let's get on with this case, please.

Mr. Pogoda: I think the question is proper, if the Court please. I heard no objection.

Mr. Starkey: I will belatedly object to it, your Honor.

The Court: I will sustain the objection. Let's proceed.

Q. Now, when did you find out for a second time, or again that a second delivery was going to be made? A. It was the last of October, around that time.

—944—

Q. Do you know when Jesse was arrested? A. No.

Q. When did you stop seeing Jesse? A. When did I stop seeing him?

Q. Yes. A. I don't think I stopped seeing him.

Q. When did you find out Jesse was arrested? A. He told me the time he got out of the jail. He told me.

Q. When was that? A. I don't know.

Q. You don't know the year? A. I don't remember.

Q. How long after the second shipment? A. I don't remember.

Q. You don't recall whether it's a month or two months after the second shipment? A. I don't remember.

Q. Do you recall why he was arrested? A. I don't remember.

Q. No idea? A. I don't remember.

Q. Do you remember when you saw him after he came

out of prison? A. (No response.)

Q. The month? A. I don't remember, sir.

Q. The year? A. I don't remember.

Q. Well, how long was it before you were arrested? A. I don't remember.

Mr. Starkey: Objection, your Honor. I think that is a matter of record at this point.

The Court: He says he does not remember.

Mr. Pogoda: I don't know that the record shows—

The Court: The witness answered he does not remember.

Mr. Pogoda: May we call upon the government to state for the record when Jesse Colson was arrested.

The Court: When was he arrested?

Mr. Starkey: I believe it was December of '59, your Honor.

The Court: December of '59.

Mr. Starkey: Yes. Agent Murphy has the exact date. July 21st.

The Court: '59.

Mr. Starkey: Yes, sir.

The Court: All right.

—946—

Q. That is quite some time ago, isn't it? A. Yes.

Q. Almost two years. Weren't you worried that you were going to be arrested too?

Mr. Starkey: Objection.

The Court: Counsel, it would be nice to get back to this case.

Mr. Pogoda: I want to know if there has been flight, Judge.

Mr. Starkey: This witness isn't on trial, Judge.

The Court: Let's proceed.

Q. In any event, there came a time when you did not see Jesse? A. I always saw him.

Q. You always did? A. I been seeing him, yes.

Q. You didn't see him when he was in jail, did you? A. I wasn't going to break in there to see him.

Q. You don't know how long he was in jail, do you? A. No.

Q. Now coming back to the second shipment, tell us how that transaction was worked out. A. Well, he told me to do the same thing I did the first time. When he called downtown, when I get the message, when I come

—947—

to the phone, to come up his house.

Leon Ellis—for Government—Cross

Q. And you were there, I take it, when the man and woman made the delivery, right? A. Yes.

Q. Now, before the first delivery Leon did not want to negotiate with you, he wanted to negotiate with Jesse, right? A. (No response.)

Q. It was Jesse who made the price with Leon for the stuff, isn't that so? A. Yes.

Q. And now, when the second delivery came in, is it your testimony now that Jesse again sent you down to see Leon? A. With a sample.

Q. With a sample? A. Yes.

Q. How much was in the sample? A. I don't know.

Q. A teaspoonful? A. (No response.)

Q. You carried it, isn't that so? A. Yes.

Q. What did you carry it in? A. In a piece of alu-

minized paper.

Q. Tin foil? A. Yes.

Q. What did you do? Give it to Leon? A. Yes.

Q. What would he do with it? A. I don't know.

Q. You never saw him do anything with it? A. No.

Q. And after you gave it to him what conversation did you have with Leon? A. I would tell him everything is okay.

Q. What did he say? A. He would say, "Yes, okay." He said, "See you tomorrow night," or something like that.

Q. Did you see him the following night? A. I don't remember.

Q. Do you know the next time you saw him? A. It was the following night, the next night or one of those nights in between there.

Q. You were also on 136th Street? A. Yes.

Q. In an automobile or on the street? A. I don't remember.

—949—

Q. Well, either would be in the automobile or on the street, isn't that so? A. I don't remember.

Q. You don't remember if you saw him on the street or in an automobile? A. At that particular time, no.

Q. Did you ever see him anywhere but on the street of 136th Street or in his automobile? A. Well, I used to see him in the restaurant, and I used to see him in the club.

Q. What street? A. 136th Street.

Q. The restaurant on 136th Street? A. Yes.

Q. Near where? A. Near Lenox Avenue.

Q. Would it be on the uptown or the downtown side? A. I don't know but the number is 102.

Q. That would be right on the corner of Lenox Avenue, isn't that so? A. I don't know exactly.

Q. Well, now, you have been in this restaurant, haven't you? A. Yes.

—950—

Q. Do you know if it is on the corner of Lenox Avenue or if it is not on the corner? A. No, it's not on the corner. It's right behind a whiskey store. The restaurant is on 136th Street.

Q. Isn't that the corner building of 136th Street, and the numbers on Lenox Avenue and on every block start on 102? A. I don't remember.

Q. How many years have you lived up in Harlem? A. I would say about 12 or 13. A couple of years in Brooklyn.

Q. Always in the vicinity of the area you described to us? A. Always? What area?

Q. 136th Street, 138th, 140th Street, Seventh Avenue,

Lenox Avenue. A. No. I used to get around a little bit up there.

Q. On the East Side too? A. No.

Q. Do you know where Mount Morris Park is? A. Yes.

Q. Where is it? A. It's around 123rd, 122nd Street, right behind the hospital there. I don't know. There is a

—951—

large church there.

Q. Right across the street from the Joint Disease Hospital, am I right? A. I don't know exactly.

Q. It starts at Madison Avenue, isn't that so? A. I don't know.

The Court: Can't we get back to this case soon?
Mr. Pogoda: Yes.

Q. Yesterday when you described the hotel in which Icky was you said Mount Morris Park. That is a different part of town, isn't it? A. I said a park. Maybe I did say—I don't think I said Mount Morris Park but I said a park.

Q. Now, after you saw Leon at 136th Street and you gave him a sample, saw him the following night or the night after that, isn't that so? A. Yes.

Q. Did you have any discussions with him the next time you saw him? A. Yes.

Q. What was that discussion? A. Well, it was about the same thing, cocaine.

Q. Well, what did you say to him and what did he say

—952—

to you? A. I asked him, I think I asked him "How are you doing, how is everything?" and he told me "I still

ain't doing nothing. I have to get up some money" or something like that.

Q. How long a period was it between the time you saw him and the time you next saw him? A. I don't understand your question.

Q. Well, did you see him after the second talk? A. I don't understand the question.

Q. After you came with the sample you told him you had a delivery, a kilo, right? A. No.

Q. You gave him a sample after the second delivery, isn't that true? A. Yes.

Q. And then you came back to find out if he wanted to buy the stuff, isn't that so? A. Yes.

Q. And you came back a couple of days later or a day later? A. (No response.)

Q. Right? A. After I took the sample, yes, a couple

of days later, yes.

Q. What happened on that occasion? A. Well, he told me he had to get up some money, and to tell Jesse that he wanted to see him or tell him to come by a day or so after.

Q. Now, did you go back with Jesse a day or two later? A. Go back with Jesse where?

Q. To see Leon. A. No.

Q. Well, now, when did you speak to Leon or Jesse about this deal, the second kilo deal? A. I didn't speak to anyone. Jesse spoke to me about it.

Q. What did Jesse say to you? A. Well, we would be riding and he would tell me when he was going to make this delivery, you know.

Q. Did he tell you how much he was going to get for this delivery? A. No.

Q. You were to get a cut of 10 per cent on this, am I right? A. Yes.

Q. You never asked Jesse whether he was selling him

—954—

$2,000 worth or $10,000? A. No, I didn't ask him.

Q. Well, didn't you discuss these matters very freely and openly with Jesse? A. No.

Q. What would you have, a code between you two as to how to discuss the matter? A. No.

Q. You had a conversation with him, he would speak to you and you would speak to him, right? A. Yes.

Q. You traveled in a car together? A. Yes.

Q. And you discussed this transaction, the second transaction with Leon? A. Me and Jesse?

Q. Yes. A. No.

Q. Tell us how you knew there was to be a delivery, a sale to Leon? A. Jesse told me.

Q. How long after the man and woman bought the stuff? A. Oh, I think five or six days, something like that.

—955—

Q. And then did you bring the stuff down to 136th Street? A. No, we didn't bring it down. We didn't bring it down 136th Street. We brought it from Park Avenue, me and Jesse.

Q. Did you know the stuff had been transferred from Jesse's house to Park Avenue? A. Yes.

Q. When did you find out it was brought to Park Avenue? A. About a couple of hours after it was in.

Q. Who told you it was brought there? A. What?

Q. Who told you it was brought there? A. I met the girl there.

Q. Where? A. I don't know the number right now but I think it is—I am not sure. My memory—1818 or 1918.

Leon Ellis—for Government—Cross

Q. What is the name of this girl? A. What is her name?

Q. Yes. A. Bedalia.

Q. What? A. Bedalia.

—956—

Q. How many times have you seen her? A. Oh, she passed.

Q. She's what? A. She has passed now.

Q. She is now dead? A. Yes.

Q. How many times did you see her before the night you went down to get the stuff? A. I used to see her quite frequently.

Q. Was that a usual stash for Jesse? A. No.

Q. Was this his girl friend?

Was she a friend of yours? A. No.

Q. Did you ever ask Jesse why he brought the stuff down there? A. No.

Q. Until this first time, or this second delivery he always kept the stuff in his house, didn't he? A. Well, I didn't know exactly where he was keeping it.

Q. Well, now, this first delivery, this first kilo was brought from his house, wasn't it? A. Yes.

—957—

Q. Now, did you ever see the stuff from the first time it was brought into his house until the night that the delivery was going to be made? A. Did I ever see it?

Q. Yes. A. No.

Q. You don't know, do you, when the stuff that the people brought into Jesse's house is the same stuff that was stashed away in Park Avenue, do you? A. Do I know?

Q. Yes. A. No, I don't know.

Q. You don't know what was in that stuff that you

picked up that night at Park Avenue? A. I don't know what was in it?

Q. Yes. Did you tape that night? A. No, Jesse was taking it out of one jar and putting it in another.

Q. Did he measure it out and count it out? A. No. He had already counted part of it out. He counted the rest of it out in my presence.

Q. Then, after Jesse had finished counting it out, he wrapped it up? A. He take the jar up and put it in the bag.

—958—

Q. And brought it uptown, right? A. Me and him.

Q. Can you tell us why they tape a jar of cocaine? A. Keep it from evaporating.

Q. And so now, in order to prevent shrinkage of the cocaine, you put this in a solid jar and tape it so that no air can get into it? A. You tape it and put a top on it and tape it around the edges.

Q. To prevent it from evaporating, isn't that so? A. Yes.

Q. How long would the stuff last if it were not done that way? A. I don't know.

Q. You then brought the stuff to where? A. Me and Jesse.

Q. Where did you bring it to? A. To 136th Street. We parked the car.

Q. Where? A. 136th Street.

Q. In the street? A. Yes. On Lenox Avenue. Then I got out of the car, both of us. Then he told me to stay over by the hospital until he go in the block and could he see Leon.

—959—

Q. Where was the stuff? A. I had it in my hand.

Q. Standing in front of the hospital? A. I was walking back and forth with it.

Q. Was it wrapped in a brown paper bag? A. It was in a bag, yes. It was in a bag, yes.

Q. And how long was Jesse in the block before something happened? A. Where?

Q. 136th Street. A. Before something happened what?

Q. That he came back. A. He came back—

Q. How long did you walk in front of the hospital with this bag of cocaine? A. About five, ten minutes.

Q. Then what happened? A. Then Jesse told me that he was going to the block—

Mr. Somers: I can't hear you.

A. (Continuing) —Jesse told me he was going in the block to see could he find Leon and when he find Leon he going to wait for me like this to come across the street. And he did.

Q. And you went across the street? A. Yes.

Q. Did you go together with Leon and Jesse back down 136th Street? A. No, I didn't.

Q. Where did you go? A. Where did who go?

Q. You. A. I came over with the jar. Leon was coming down the street and Jesse told me to give him the jar. I gave him the jar and he gave it to Leon.

Q. Then where did you go? A. Where did I go?

Q. Yes. A. We went and got in Jesse's car and went downtown to—

Q. Where? A. I don't know. It is around 122nd Street, down near the park down there, Manhattan Avenue. I don't know which avenue it is.

Q. What did you do when you got there? A. What did I do?

Q. Yes. A. Just sat in the car. Leon got out and said he

—961—

would be back in about 15 or 20 minutes.

Q. When he got out of the car, did he take the stuff with him? A. I don't remember.

Q. There was $12,000 worth of merchandise, is that right? A. (No response.)

Q. Am I right? A. It could be more than that. I don't know.

Q. That's what he eventually got for it, isn't that so? A. I thought it was fourteen. Jesse said it was twelve. I don't know directly.

Q. Well, now, is it your testimony that Leon walked away with $12,000 worth of merchandise and you don't remember whether he did or did not? A. Did or did not what?

Mr. Starkey: May I have that question read, please, your Honor.

The Court: The witness has answered the question. He says he does not know whether or not Leon took the stuff with him.

Mr. Starkey: All right, your Honor. I withdraw my request.

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Mr. Carluccio: Your Honor, with the utmost respect for your Honor's ruling and at the risk of incurring the ire of the Court, I wish that a moment or a minute be spent to discuss the termination time of this daily trial for many reasons, one of which, which I have noticed right now, is that a new

stenographer has been placed in place of the other stenographer. I don't see how he would know myself or other counsel at this time in taking his testimony. That is one reason and for other reasons which I mentioned, and it is before supper, and also another reason that maybe many of us in the courtroom have to travel some distance, have train schedules to make, and in addition to which there is a gale blowing which is very serious at this point, and I wish we could take a minute to discuss the termination of this—

The Court: We will terminate the hearing after this cross-examination. Let's proceed.

By Mr. Pogoda:

Q. Mr. Ellis, you don't recall now whether Leon took the bag with the stuff out when he went into the house? A. I don't know.

Q. When he came out of the house, what happened?

A. Down 136th Street?

Q. Yes. A. He came back out with two bags. So he gave it to Jesse. Jesse put it on the car seat. Leon got in the car and dropped him off at 136th Street and Seventh Avenue and went up to Jesse's house.

Q. You did not see Jesse give him the package at the time that Leon gave him the money, right? A. He gave him the package in the street there.

Q. That is the last you saw of the package? A. Yes. He gave Leon the package. Leon went in the restaurant and he told Jesse to wait a minute, he would go with him.

Q. There was still $12,000 to be paid, wasn't there? A. Yes.

Q. You were still to get your cut out of that $12,000, isn't that so? A. I don't understand.

Q. You were still to get your cut of $12,000? A. I was looking for to get my cut?

Q. Yes, your cut out of the $12,000. A. Yes, I was looking to get something.

Q. Didn't you want to make sure you were going to

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get paid? A. Yes.

Q. When the second shipment came in with the man and woman, did you see Jesse pay him—pay the man and woman for the second kilo delivery? A. I saw him give them some money. I don't know how much it were.

Q. You mean when they brought in the second delivery, you were present when Jesse paid the man and woman for the shipment? A. Yes, I was present when Jesse gave the man and woman some money, yes.

Q. Was that at the time of the delivery or was that after the sale that was made? A. It was after the sale.

Q. How much money did he give him? A. I don't remember.

Q. That was the time, I take it, that you drove them downtown to 32nd Street and Broadway, isn't that so? A. Well, yes. I went with Jesse. Jesse was driving down there in his car and went down to 32nd or 33rd Street, down in that neighborhood.

Q. Coming back to your return from Chicago and Mississippi, that was in February of 1958, right? A. Yes.

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Q. Until this time you never mentioned the name of Duke. Did you know Duke? A. On this time?

Q. In your testimony that you gave, the first time you mentioned the name Duke was when you returned from

Chicago and Mississippi after attending your mother's funeral. A. I don't think I was asked about that.

Q. Now my question is this: When for the first time did you meet Duke? A. I don't know. I met him in '57.

Q. When in '57? A. I don't know. I don't know.

Q. Nothing outstanding about your meeting Duke, was there? A. No.

Q. You had no business dealings with him? A. I met Duke as—Jesse introduced me to him as his brother. I thought they was brothers all the time.

Q. They were very good friends from what you could see, am I right? A. Yes.

Q. Now, had you ever been to Duke's home? A. No.

—966—

Q. Had he ever been to your home? A. No.

Q. Had you ever been out to any dances or parties together? A. No.

Q. How many times would you say you saw Jesse before you went out to attend your mother's funeral? A. I don't remember.

Q. A few times? A. I don't remember.

Q. It could have been one time? A. I don't remember.

Q. You were not very well acquainted with him, were you? A. Well, we was—I won't say—but we was all right.

Q. You mean you had no arguments? A. No.

Q. Did you ever go to ball games together or flights together? A. No.

Q. You never went out together as buddies, did you? A. No.

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Q. Now, when you returned from Chicago and Mississippi after attending your mother's funeral, how did you

get in contact with Duke? A. Jesse told me to go down and ask him why is he angry with him and anything. That's how I got in contact with him.

Q. Jesse told you that he and Duke had a falling out? A. Well, yes, they had an argument about the car.

Q. And you thought you would do Jesse a favor to go down and see Duke? A. Jesse asked me.

Q. Until this time you only had two transactions for Jesse, am I right? The $300 one and the $5,000 transaction, right? A. Yes.

Q. And this was but a short time after you met him that your mother died? A. Yes.

Q. And he asked you to go down and see Duke to try and bring Duke and him together again. But wasn't your purpose there to try and get them to resume their friendship? A. It was my purpose?

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Q. Wasn't that the purpose of your visit to Duke's girl friend's house?

The Court: The question was why did you go to see Duke?

A. I went because Jesse asked me to go.

Q. What did he ask you to do for him, accomplish for him? A. He didn't ask me to accomplish anything.

Q. Jesse knew why Duke was mad at him, am I right? A. I don't know exactly. He said he thought Duke—he thought Duke was mad at him about the car incident.

Q. And you were going to patch up things between two friends? A. No. I was going down—he sent me down there to see what he was mad at him about.

Q. And it was while you were down to Duke's house at this time and having a conversation with him about why

he was mad with Jesse that the matter of narcotics came up? A. Yes.

Q. You didn't go down there for that purpose, did you? A. No.

Q. As far as you knew Duke wasn't involved in any

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such thing; am I right? A. In what such thing?

Q. In narcotics. A. As far as I know?

Q. Yes. A. Well, as far as I know that he wasn't involved?

Q. That's right A. I know he was involved.

Q. Did you ever have any business transactions with him? A. With Duke?

Q. Up until this day? Yes, with Duke. A. No. Jesse was my boss.

Q. All you knew is what Jesse told you; am I right? A. Yes.

Q. And you know Jesse lied, too, isn't that so?

Mr. Starkey: I'll object to that, your Honor.
The Court: I will overrule the objection.

Q. You know Jesse lied. A. I don't know.

Q. You know he did you out of a commission on $2,000 on the first occasion, am I right? A. I don't know.

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Q. Didn't you count 14,000 when it was only twelve? A. No, I didn't.

Q. You thought it was fourteen but it was only twelve, am I right? A. That's what he said.

Q. What did you say it was? A. What? I said I thought it was 14,000.

Q. You can count, can't you? A. Yes.

Q. You had an interest in this money, didn't you? A.

I didn't have the access—to count all the money. I was just putting the denomination of the bills together.

Q. Well, now, it was that time that you say Duke spoke to you about a deal; right? A. At what time?

Q. When you were back from Chicago, when you were down at his girl friend's house. A. No, I didn't say that.

Q. When did he first speak to you about making a deal with him? A. Making what deal?

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Q. Yes. A. I don't know.

Q. You don't know? You don't know when Duke spoke to you to try to sell a package for him? A. No.

Q. Can you give us an approximation of the month you spoke to Duke about selling stuff for him? A. I don't know what you are talking about.

Q. Well, did you testify on direct examination that at Duke's request you approached Leon and made a sale for Duke? A. I didn't say that.

Q. Never made a sale for Duke? A. No.

Q. Did you introduce Duke to Leon? A. No, I didn't introduce him, no.

Q. So that as far as you know you never made a sale to Leon for Duke nor did Duke make a sale to Leon himself? A. Me and Duke was together, and we went down to 136th Street and waited for Leon to come around, and we got in Leon's car, and then Duke gave him the package and he received some money. I don't know what the contents was in the package or how much money he got. I know he gave me $75.

—972—

Q. You don't know how much of a package there was delivered? A. How much was the package?

Q. Yes, the cost of the package? A. It was a package.

Q. And this was without a previous appointment or discussion by you with Leon? A. Yes.

Q. In other words, you and Duke together went over to 136th Street, you looked for Leon, Duke went over to Leon, made a deal with him, gave him a package, got money and after that he gave you $75. A. Duke, he told me that he had—

Q. I am asking you, did he give you $75 after that?

Mr. Starkey: Wait, your Honor.

The Court: That is a long question just for that $75. Do you want to rephrase the question?

Mr. Pagoda: All right. I will break it down.

Q. First tell us where Leon or Duke got in touch with you that day. A. 140th Street.

Q. Did you ever see—did Duke ever see you on 140th Street before? A. Yes.

—973—

Mr. Starkey: Objection.

The Court: I think he answered the question.

Did you answer that?

The Witness: Yes.

The Court: He said yes.

Q. Do you know what time of the day or night it was? A. I don't remember.

Q. Did Duke have the package with him on that occasion? A. Yes.

Q. What did Duke say to you when he met you on 140th Street? A. He said—he called my name. He said "Hi, Schoolboy. How you feel?" something like that. He said "I got a package for your man." He said "Do you want to

walk around 36th Street with me?" I said "Yes." and we went around 136th Street and seen Leon, so Duke saw a friend of his, a girl live up over the club, and we went up there and stayed about an hour, hour and a half.

Q. Was it a friend of—a girl friend of Leon or a girl friend of Duke that you saw? A. A friend of Duke's.

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Q. Not Leon's? A. It was a friend of Duke's.

Q. And when did you see Leon? A. About an hour and a half after we was up there, approximately. I came back downstairs.

Q. And how did you approach Leon? Did you approach Leon yourself or did you approach him with Duke? A. I approached him myself.

Q. What did you say to Leon? A. I told him "A man is upstairs here. I got a package for you." Leon say "Where it is?" I say "Right upstairs over the club." and he told me to go get him. I went and got him and I came downstairs, and we got in the car and Duke gave Leon the package.

Q. You were in the car— A. Yes.

Q. —when Duke gave Leon the package? A. Yes.

Q. Was there any conversation between Duke and Leon? A. There was a conversation, but I don't remember much of it.

Q. You don't remember any part of the conversation? A. No.

—975—

Q. When did Duke give Leon the package? A. When he give it to him? It was in the car.

Q. Was the car parked somewhere or was it moving? A. No, the car was in motion. It was moving.

Q. Leon was driving the car? A. Yes.

Q. Do you recall the color of that car? A. No, I don't.

Q. This was broad daylight? A. No. It was just about evening, say about—I don't know, I think it was around about between 6 and 7 o'clock, in the region of that time, I think. I am not sure about the time.

Q. Have you any idea of the month? A. I'm not quite sure, but I think it was in March. I am not quite sure.

Q. Was this the same automobile that you always saw Leon in? A. I don't remember.

Q. Did you see Leon pass Duke any money? A. Yes.

Q. How much money? A. I don't know.

Q. Well, when he passed—when Leon passed Duke the

money, did he say "Here is so much money"? A. I don't remember.

Q. You don't remember any conversation between Duke and Leon at all as to how much was in the package and how much Duke wanted for the package? A. No, I don't remember.

Q. When did Duke give you the $75? A. When I went down to his girl friend's mother's house. I went down there with him.

Q. Was that right after the money had been paid by Leon to Duke? A. Yes.

Q. The same day? A. Yes.

Q. Did you see Duke again after that? A. Did I see Duke again after that?

Q. Yes. A. Yes, I saw him a lot of times after that.

Q. Well, how soon after this? A. I don't remember.

Q. Did you know what Duke was doing for a living? A. No.

Q. You knew Duke was a seaman, didn't you? A. Yes.

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Q. You knew he took trips? A. Yes.

Q. Did Mr. Starkey or Mr. Murphy ever tell you when the defendant Duke was on a voyage? A. No.

Q. Did you ever discuss with anyone connected with the government when Duke or any other seaman defendants in this case were on voyages? A. No.

Q. Did Mr. Starkey or Mr. Murphy ever suggest to you that March would be a good month because in April of 1958 Duke was on the high seas?

Mr. Starkey: I will object and I will ask the Court to remind counsel that he must have a basis for asking questions of that kind.

Mr. Pagoda: I am mentioning a name directly. I am asking whether it was suggested to him by that person.

Mr. Starkey: Precisely, your Honor. It is that to which I am objecting.

The Court: The jury will disregard the implication of counsel's questions because counsel is not testifying. But I will overrule the objection just to expedite the matter.

Can you answer the question?

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Did anybody tell you anything like that?

A. No.

The Court: All right.

Leon Ellis—for Government—Cross

By Mr. Pagoda:

Q. Did you ever find out from anyone connected with the government how you were arrested—how come you were arrested? A. Yes.

Q. Who told you how come you were arrested? A. Agent Murphy said I am being arrested for violating the Narcotics Act.

Q. Did he tell you who squealed on you?

Mr. Starkey: Objection.

A. No.

The Court: He said no. Let's proceed.

Mr. Starkey: I would—

The Court: The witness said no, he didn't.

Mr. Starkey: I would just like to request the witness through the Court not to answer after I object unless the Court has ruled.

The Court: Don't answer after you see Mr. Starkey getting up. Let's proceed.

Q. Have you any idea who pointed a finger at you?

Mr. Starkey: Objection.

The Court: That is overruled.

Q. No? A. No.

Q. Now, Mr. Ellis, I don't recall now, but when you were brought into Mr. Starkey's office was it Mr. Starkey or Mr. Murphy or—I will withdraw the question.

Who told you that you would receive consideration if you testified in this case?

Mr. Starkey: I will object, your Honor. I am not sure that that is—

The Court: I will sustain that objection. No one said that to him. He hasn't testified to this.

Mr. Pagoda: He has so testified, if the Court pleases, if my memory serves me correctly.

Q. Did anyone promise you consideration if you testified in this case? A. No, not—

The Court: I think he testified, to expedite the matter, he said that if he testified the matter would be called to the Court's attention. I think that's about what he said.

Q. What did you take that to mean? A. I didn't know what he mean.

Q. Well, you knew if you didn't testify and they pressed

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a charge against you you might face a long term in prison. Did you not know that?

Mr. Starkey: Your Honor, I will object to the form of that question.

The Court: That's—

Mr. Starkey: It implies a causal relationship.

The Court: That is overruled.

You knew that violating a narcotics law could involve a long term in prison. You knew that, didn't you?

The Witness: Yes.

The Court: And that had something to do with your testifying, didn't it?

The Witness: Oh, yes.
The Court: All right.

By Mr. Pagoda:

Q. Weren't you looking to buy your way out of prison, if you could?

Mr. Starkey: I will object to the form of that question.
The Court: I will sustain the objection.

Q. Weren't you looking to make a deal so that, if you testified, you may not go to prison for a long term?

Mr. Starkey: Objection to the form again, your

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Honor.
The Court: I overrule the objection.
Weren't you trying to help yourself by testifying so if possible you wouldn't go to jail?
The Witness: Yes.
The Court: All right.

By Mr. Pagoda:

Q. And did Agent Murphy or anyone else in connection with the government tell you that if you did not testify that you would go to jail for a long time? A. No.
Q. Since your arrest have you received any money from the government? A. I am under protective custody.
Q. Where are you staying? A. Where I am staying?
Q. Yes.

The Court: Wait just a minute. You don't have to answer that.

Q. Are you living in a hotel here in New York?

The Court: You don't have to answer those questions.

He is in protective custody. He does not have to disclose where he is, sir.

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Q. Are you being held as a material witness in this case?

Mr. Starkey: I will object to that question, your Honor.

The Court: I am not sure the witness understands what a material witness is or whether or not he is being held.

Are you being held in jail or any place like that?

The Witness: No.

The Court: He is not being held in jail.

Q. You were paroled or released in your own recognizance when you appeared before a commissioner on April 25, 1958, am I right? A. Yes,

Q. You were not held on bail?

The Court: No, he testified to that. He has no bail.

Q. At that time was there an application by Mr. Starkey or anyone else connected with the government that you come under their protective custody? A. No.

Q. When did you come under their protective custody?

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A. I don't know exactly what date.

Q. Did you go home on the night of April 25, 1961? A. I don't remember.

Q. Well, did you walk out of the commissioner's courtroom or office without handcuffs? A. Yes.

Q. And were you free to leave the building? A. Yes.

Q. Did you leave the building alone? A. Yes.

Q. Where did you go from there? A. I went home.

Q. So you were not under protective custody? A. Not at that time, no.

Q. When did you come under the government's protective custody? A. I don't know exactly what date. About three weeks ago, some time like that.

Q. Other than the government, that is, any of these special agents, or the U. S. Attorney's office, did anyone else ever speak to you about this case? A. I don't remember.

Q. You don't remember when anyone other than those connected with the government spoke to you about this

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case? A. Any one of those—please repeat that.

Q. Did anyone but Agent Murphy, Mr. Starkey or others connected with the government speak to you about this case? A. No. A couple of them speak to me about this case.

Q. Who? A. I don't know which ones. I don't remember now.

Q. Were they government agents? A. Yes.

Q. Other than government agents, did any—did lawyers you see here speak to you? A. Any who?

Q. Any of the attorneys you see sitting in the courtroom talk to you about the case? A. They was—what do you mean, privately or in court?

Q. Privately. A. No.

Q. So that from the time you were arrested until the time you appeared in the courtroom, no one approached you about your testimony in this case except the government, isn't that true? A. I don't understand the question.

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Q. Now, Mr. Ellis, what I am trying to find out is this: Did anyone talk to you about your testimony in this case except those who are connected with the government? A. Well, yes. They told me to just try to tell the truth to the best—the way—

> The Court: Just a minute. That is not the question. The question is whether or not somebody or some people outside the government talked to you about the case.
>
> The Witness: Yes, sir. I had a lot of people talked to me about the case. My boss, my uncle, a few other people talked to me.

Q. But no one connected with any of these defendants or their attorneys spoke to you about your case? A. No.

Q. Nobody told you what to say on this witness stand; am I right? A. No.

Q. The only one you discussed what you were going to say with is the government? A. I don't know how to answer that.

Q. Well, now, how did it come about that you were

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brought under the protective custody of the government? A. Because I was threatened a couple of times.

Q. By whom? A. By Jesse Colson.

Q. Jesse Colson was the one who threatened you, am I right? A. Yes.

Q. He was the one who put the finger on you?

Mr. Starkey: I will object to that, your Honor.

The Court: I will sustain the objection.

Q. When did Jesse Colson threaten you? A. I don't know what date. It was quite some time ago.

Q. Was that before you saw Jesse Colson in Mr. Starkey's office? A. Yes.

Q. When you saw Jesse Colson in Starkey's office, you were friendly with him, weren't you? A. Yes. We talked.

Q. You weren't worried about him at that time, were you? A. I weren't worried about him no time.

Q. Even after he made the threats? A. No. I wasn't

worried about him. I wouldn't be afraid of him, if that's what you are trying to get.

Q. You know Jesse Colson shot someone, am I right?

Mr. Starkey: Objection.

The Court: Just a minute, please. I sustain the objection. Let's stay with this case, please.

Q. In any event, when you saw Jesse Colson down in Mr. Starkey's office, you were back on friendly terms again, right? A. We weren't back on friendly terms. We was speaking but we wasn't on friendly terms.

Q. You were discussing your story in court and he was telling you what he was going to say, right? A. No.

Q. You never discussed your testimony? A. No.

Leon Ellis—for Government—Cross

Q. Weren't you, Jesse, Mr. Starkey and Mr. Murphy in the same room going over your testimony? A. Going over my testimony?

Q. Yes. And going over his testimony as well? A. No, I don't think—Jesse weren't there. Jesse wasn't there.

Q. Did you or did you not tell us on cross-examination earlier this afternoon that you and Jesse were both to-

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gether in Mr. Starkey's office with Mr. Murphy when each of you were discussing your testimony? A. I don't recall. Maybe so, but Mr. Starkey have a big office and he have a private office down there outside.

Q. Did you hear what Mr. Colson—Jesse Colson was saying to Mr. Starkey? A. No, I don't think so.

Q. Tell us, by some point in the courtroom, how big Mr. Starkey's office is. A. His private office?

Q. Yes. A. It is approximately from about from this point (indicating) to this point to here, I would say. It is just approximately a little larger.

Q. How deep is it? A. What do you mean by deep?

Q. You said it is that wide. A. Yes, about this wide, this width (indicating), and about from say here to this long or a little longer.

Q. From there to the wall? Is that what you are pointing out? A. Approximately, yes.

Mr. Carluccio: For the record, I think some dis-

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tance should be made, your Honor, because this and this would not appear on the record.

A. I will go and get a tape ruler and go down and measure it.

Mr. Carluccio: Your Honor I think can approximate it.

The Court: I will approximate it. About ten feet by about twelve, fifteen feet. All right.

Q. Did you know Jesse Colson to be a man of violence? A. What?

Q. Did you know Jesse to be a bad actor? A. I don't know.

Mr. Starkey: I will—

The Court: He said he didn't know.

Q. After he threatened you, did you come down and tell Mr. Starkey? A. Not at that point, no.

Q. How soon after Jesse threatened you did you come down and tell it to Mr. Starkey? A. Oh, I don't think I even told it to Mr. Starkey. I told him in front of his face —in front of his face I was telling him.

Q. Telling who? A. Jesse.

Q. Did you ever tell Mr. Starkey or Agent Murphy that you had been threatened? A. Yes.

Q. When was that? A. I don't remember that.

Q. And was that the time you were put under protective custody? A. No.

Q. How long after that conversation with either Mr. Starkey or Agent Murphy were you put under protective custody? A. I don't know. I have been under protective custody approximately about 15 days.

Q. And during these 15 days how often would you see Agent Murphy? A. I don't know. I would see him—ever

since last Tuesday I have been seeing Agent Murphy every day.

Q. Now, while you were in protective custody you have been going over your testimony in this case, reviewing your testimony? A. Have I been reviewing it?

Q. Yes. A. What do you mean, looking at it?

Q. No, discussing it, talking about. A. No.

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Q. So that until you saw Mr. Starkey last week, you had not discussed what your testimony will be since you were in protective custody? A. I don't know that.

Q. You don't remember? A. (No response.)

Q. Mr. Ellis, would you be good enough to tell us what Jesse Colson said to you that you considered a threat? A. You know, he called me a couple of names. He says "You are going around talking about me" and he said "I should have knocked you out," you know. And I raised up—I got up. He told me to sit down, you know. I told him "If you are going to shoot, Lester, start shooting."

Q. Were you afraid he was going to shoot? A. No, I weren't afraid.

Q. Do you know whether he ever shot anyone that made you say this? A. In other words, it didn't make any different whether he shot hundreds. It didn't make any difference to me.

Q. Did you know that he had shot somebody? A. Yes.

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Q. And when you said "Start shooting," weren't you afraid he might start shooting? A. No, I weren't afraid.

Q. You were not afraid? A. No.

Q. All right. Now where did this conversation take place? A. In Carter's Corner.

Q. That's uptown? A. Yes.

Q. That was one of the places that you and Jesse used to go together? A. Yes.

Q. Do you drink very much? A. Well, I drink.

Q. Hard liquor? A. Well, I drink whisky.

Q. Did you have any drinks the night you were arrested? A. No.

Q. This was about 9:30 at night? A. Yes, approximately 9:30.

Q. And you had no drinks all day and that evening? A. No.

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Q. Did you ask for a drink after you were arrested? A. No.

Q. Did Agent Murphy or the arresting officer take you in for a drink? A. No.

Q. Now, the next morning was it Agent Murphy who took you out of West Street?

The Court: Are you starting over now?

Mr. Pagoda: No, I haven't been on this at all, Judge. I haven't been on this.

Q. Was it Agent Murphy who took you? A. Yes.

Q. Did you have breakfast in the jail or did you have breakfast in a restaurant? A. Had breakfast in jail.

Q. Did you have any whisky to drink that day? A. Not until after.

Q. Not until after you got out of court? A. After I got uptown.

Q. You mean after you had been before the commissioner, right? A. Yes, after I went uptown to 139th Street and Seventh Avenue and Carter's Corner Bar. That's where I had my drink at.

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Q. Since you have been under government protective custody have you had anything to drink? A. Yes.

Q. In a bar or in a hotel where you are staying? A. In a bar.

Q. Agents have gone with you to a bar? A. Well, yes.

Q. They pay for your drinks? A. No.

Q. Are you being paid while you are in protective custody? A. I get—I think it is $4 a day for food.

Q. And from the $4 a day you buy yourself liquor? A. I have been working, too, you know.

Q. Have you worked at all since April 25th? A. Yes. I worked last Monday and Tuesday, and Saturday I worked.

Q. While you were under protective custody you were working? A. Yes.

Q. And was the government agent at the place of business where you worked? A. Yes, he is on the outside.

Mr. Pogoda: I have no further questions.

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The Court: We will recess until 10:30 tomorrow morning under the same instructions. Do not discuss the case with anyone. If anyone attempts to discuss the case with you, report the matter to the Court. Tampering with a juror is a very serious offense.

10:30 tomorrow. You must also remember that the case is not over. All the evidence is not in and you must reserve your judgment in this case until it is given to you for your deliberation.

10:30 tomorrow morning.

(Jurors left box.)

(Adjourned to June 22, 1961, at 10:30 a.m.)

Leon Ellis—for Government—Cross

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New York, June 22, 1961
10:30 o'clock a.m.

Trial resumed

(Jury in box)

LEON ELLIS resumed.

The Court: Shall we proceed, gentlemen?

Cross Examination by Mr. Somers:

Q. Good morning, Mr. Ellis; do you feel all right today? A. Fine, sir.

Q. Do you feel a little better than you did last night? We worked pretty late last night. A. I think I went to sleep about 9 o'clock.

Q. Your memory is good, I hope, today, isn't it? A. I think so.

Q. I just want to ask a few questions. Do you mind if I call you Schoolboy? A. No.

Q. Pretty nearly everybody calls you Schoolboy, don't they? A. Yes.

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Q. Most people know you by the name of Schoolboy rather than Leon or Leon Ellis? A. Yes.

Q. Tell me, Schoolboy, do you know a fellow by the name of Joe DeLeon in the narcotics business? A. I don't think so.

Q. You never heard of him? A. No.

Q. Did you ever hear of a fellow by the name of Leon Velasquez? A. No.

Q. Do you have a cousin by the name of Leon? A. (No response.)

Q. A cousin? A. Not as I know it.

Q. Do you know a fellow by the name of Leon Bradoni? A. No.

Q. Do you know any other Leon except Leon Aiken? A. I know a few but not their last names. In the street, yes, I know a few Leons.

Q. And your name too is Leon? A. Yes.

Q. By the way, before I forget, do you know the Purple Manor Bar on 125th Street in Harlem? A. Yes.

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Q. And did you have occasion, around the 10th or 11th of May, not too accurately about the dates, but after that, after you were arrested, to go to that bar? A. Yes.

Q. You were there with a federal agent? A. No.

Q. Alone? A. Yes.

Q. Did you see Leon Aiken, this defendant, at the bar when you were there? A. Yes, I saw him one time while I was there.

Q. You pointed him out to somebody? A. No.

Q. Now, Schoolboy, can you give me the date of your birth? When were you born? A. December 28, 1927.

Q. You are about 35 years old? A. 33.

Q. And where were you born? A. Lexington, Mississippi.

Q. And how long did you live there? A. Until I was sixteen.

Q. And did you have brothers and sisters? A. Yes. I

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have a brother and a sister.

Q. A father and a mother? A. Yes.

Q. Did you have to work while you lived in Lexington? Were you employed? A. No, I wasn't employed.

Q. You didn't have to take care of anybody in the family? A. My father was a pretty good provider.

Q. You went to school up until the time you were sixteen? A. Yes.

Q. And then you left Mississippi and went where? A. I volunteered for the Navy.

Q. You went into the Navy? A. Yes.

Q. How long did you serve in the Navy? A. About approximately two years and nine months, something like that.

Q. Were you ever AWOL while you were in the Service? A. No.

Q. Was your record good all the time? A. I had a 4.0 record.

Q. Never a captain's mast? A. Yes, I had a captain's

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mast.

Q. You had a little trouble here and there but you were very young, though? A. What?

Q. You had a little trouble but nothing very important? A. No. I was restricted—

Q. In the brig? A. No. I was restricted to the base a couple of times.

Q. Do you remember why? A. I think it was for disobeying the steward, or something like that.

Q. You were then about 17 or 18 years old, I take it? A. I was still 16.

Q. What sort of a discharge did you get? A. An honorable discharge.

Q. And then after you got out of the Navy did you go to Chicago? A. No. I went home.

Q. Back to Lexington, Mississippi? A. Yes.

Q. What did you do there? A. I went back to school.

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Q. And how far did you go back to school? Up to what grade? A. I stayed in school about four months.

Q. And then what did you do? A. Then I left and I came to New York.

Q. You came to New York? A. Yes.

Q. Not to Chicago? A. No.

Q. So that you had been in New York for the last, roughly, 18 or 18 years? A. No. From '46 to up to this time.

Q. Up until this time? A. Yes, sir.

Q. About 15 years? A. Roughly.

Q. And what have you been doing to earn a living in New York, will you tell me that again? A. Orthopedic mechanic.

Q. Orthopedic mechanic? A. Yes.

Q. That is your regular trade? A. Yes.

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Q. You are a member of the union, I take it? A. Yes.

Q. Have you got your union card with you? A. No. I have an old one with me, but I don't have the new one.

Q. I take it you have—well, we will accept that.

I take it you have a Social Security card? A. In my pocket?

Q. No. But you have a Social Security card? A. Yes.

Q. And you file income tax returns? A. Yes.

Q. When was the last time you filed? A. April 15, this year.

Q. April 15 of this year you filed an income tax return? A. Yes.

Q. And what did that return reflect? What sort of employment did that reflect? A. I have it in my pocket.

Q. You have it ready for us, is that it?

(Witness hands document to Mr. Somers.)

Q. This is your W-2 form, is it? A. Yes.

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Q. And you actually were working for Apex Foot and Health Products during this time, weren't you? You actually were employed by them? A. Yes.

Mr. Starkey: Your Honor,—

The Court: Mr. Somers, are you going to get back to this case soon?

Mr. Somers: If your Honor please my entire line of questioning has nothing to do with anything but this case.

The Court: Nothing but this case.

Mr. Somers: I am not interested in anything but this case.

The Court: Sir, I haven't been able to recognize it, and I am sure the jury hasn't been able to recognize it either, so please get on with this case.

By Mr. Somers:

Q. Now, in yesterday's testimony, Leon, you told us, in response to various questions put by the cross-examiners, that in 1956 you got a leave of absence from this firm? A. Yes.

Q. And what do you mean by a leave of absence? A.

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I just left the firm.

Q. You left the firm? A. Yes.

Q. And in late 1957 and throughout 1958, you engaged in the narcotics and numbers racket, is that correct? A. Would you mind repeating that question, please?

Q. Late in 1957 when you first met Jesse Colson, and throughout 1958 until October or November of 1958, your time was taken up primarily with narcotics and numbers, is that correct?

Mr. Starkey: Objection, your Honor. I submit that this information too has been well covered.

The Court: Well, the answer to that is yes, so let's proceed to something else.

Q. Isn't that correct? A. Yes.

Q. You were not doing very much in the Apex Foot business, were you? A. (No response.)

Q. Were you?

The Court: He said he was off for several years. It has all been explained. The jury understands all this. Let us get on.

Q. Do you know somebody by the name of Sylvia Ferris?

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A. Yes.

Q. Did you see her around here during the course of this trial? A. Yes.

Q. Do you know her or have you learned from any source at all whether or not she testified in the course of this trial? A. Do I know?

Q. Yes. Do you know whether or not, or has anyone told you whether or not, Sylvia Ferris testified in this trial? A. Yes.

Q. You know she did testify? A. She was in the witness room. She came in here. I don't know what she said in here.

Q. You were not present, I know. You didn't hear it? A. That's right.

Q. Do you know her association with Icky Thorn? A. Well, as far as I know, I thought they was old man and old lady.

Q. You mean husband and wife? A. I wouldn't say that.

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Q. Well, that is that they lived together? You knew they were close? A. I couldn't say they was living together. I saw them together a few times, yes.

Q. Where? Where did you see them together? A. At the hotel.

Q. That would be at 115th Street? A. Yes.

Q. Now, you saw them together at the same time Leon Aiken was there, isn't that correct? A. No, not exactly.

Q. Well, was there an occasion when you were down there that Leon Aiken was there at 115th Street at Icky's house? A. Yes.

Q. And didn't you say that when you came in there with Jesse, Icky and Sylvia were there? A. They was in the—the hotel is—you go in a room, and there are little rooms all around there, and they was over in another room.

Q. Well, wasn't it a fact that Sylvia Ferris, this young lady who was here as a witness, opened the door to let Leon in? A. No.

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Q. Well, who did? Do you remember that? A. Jesse.

Q. Jesse opened the door himself? A. Yes.

Q. Did he have a key? A. I don't know.

Q. But when you came in there Sylvia Ferris was there with Icky? A. No.

Q. Didn't you just tell us that Sylvia was there? Was she or wasn't she? A. I told you that she was in another little room there with a friend of hers and this little hotel, the quarters, you go in the hotel on this floor, and there are rooms all the way around in the little quarters there.

Q. She saw Leon Aiken there, though, didn't she? A. I don't know.

Q. Was it possible for him to sneak in there so that she couldn't see him? A. I don't know.

Q. Well, on the occasion when you came down there with Leon Aiken and Jesse, Icky and Sylvia were there?

Mr. Starkey: Your Honor, I will object, and I

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submit that the witness' testimony is clear in this regard.

Mr. Somers: It is not clear to me.

The Court: Well, he has been over it several times.

Q. She was there, wasn't she? Yes or no.

The Court: The witness explained exactly where she was, about the rooms, and so on, and about the differences in the rooms. That was my understanding of what he said, and he said it at least a half a dozen times so far.

Q. Schoolboy, do you remember the first time you were arrested in this case, the only time you were arrested in this case? A. I don't remember the date.

Leon Ellis—for Government—Cross

Q. If I tell you it was April 24, 1961, would that refresh your recollection? A. I don't remember.

Q. You don't remember? A. No.

Q. But you do remember making the statement that has been introduced here in evidence on the 25th in Mr. Starkey's office, don't you? A. I remember making the statement. I don't know what date it was.

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Q. All right. Now, how soon after you were arrested by the agents were you brought down to Mr. Starkey? A. The next day.

Q. The following day? A. Yes.

Q. And that same date preceding the day you were to see Mr. Starkey, that would be the day of your arrest you were taken down to West Street, I take it, the Federal Detention Headquarters? A. I was taken down to West Street. I got arrested about 9.30 at night and I was taken straight down to West Street.

Q. And early in the morning you were taken down to Mr. Starkey's office? A. I wouldn't say early in the morning. It was about 10.30. And Mr. Starkey was in court, and Mr. Murphy took me down in court and we waited until Mr. Starkey finished.

Q. And then do you remember substantially, in your own language, what was said between you and Starkey on this first meeting? What did Starkey say to you and what did you say to him? A. I don't remember.

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Q. You don't remember at all? A. No.

Q. Well, he was talking about your arrest, wasn't he? A. I don't remember.

Q. You don't remember that at all? A. No.

Leon Ellis—for Government—Cross

Q. Do you remember whether he said anything to you about narcotics? A. He told me what I was charged with. He told me I was charged with violating the narcotic act.

Q. And did he let it rest at that? Nothing else was said? A. I don't remember.

Q. Now, you don't remember that? A. No.

Q. So that when you were charged by Mr. Starkey with violating the narcotics act you said nothing? A. I said nothing?

Q. You said nothing? What did you say? A. I don't know what I said then. I don't remember.

Q. Well, suppose I let you look at this statement and maybe this will refresh your recollection as to what you

told Mr. Starkey (handing). Look it over.

The Court: All right, he has read it.

Q. Now, does that sort of recall some of the talk in Starkey's office to you? A. Yes. After I was arraigned in the Commissioner's office.

Q. Oh, you were arraigned before you spoke to Mr. Starkey? A. Yes.

Q. Well, in the arraignment this was shown to you, was it not (handing)? A. Yes.

Q. And you knew then that you were charged with possession of six ounces of cocaine on the 12th of February, 1958? That is what you were arrested for; is that correct? A. I understood that I was arrested for violating the narcotic act.

Q. And did Mr. Starkey tell you, in his office, that he was interested not only in this particular six ounces but he wanted to know generally your association with others in the narcotics racket? A. No.

Q. Didn't say that at all? A. No.

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Q. Well, how long were you there with Mr. Starkey talking to him, can you tell us that? A. When? What time?

Q. On the 25th, the day after your arrest, and following your arraignment before the United States Commissioner, you say that you were arraigned before the Commissioner before you were taken to Mr. Starkey's office; do I understand that correctly? A. No. I went to Mr. Starkey's office and he told me what I was charged with, and Agent Murphy and him took me downstairs to the Commissioner's office and I was arraigned.

Q. And then you came back after the arraignment to Mr. Starkey's office when you made this statement, isn't that correct? A. Yes.

Q. Now, in this statement you mentioned a great many things to which you testified here in court the last couple of days, is that correct? A. (No response.)

Q. Do you want me to read it to you? Don't you remember what you said? Have you completely forgotten this now that you are in court today?

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Mr. Starkey: Your Honor, I will ask him to ask one question at a time.

The Court: Why don't you ask this man some questions?

Mr. Somers: I am asking him specifically the conversation he had with Mr. Starkey.

The Court: The conversation is recorded and you have the statement right before you.

Mr. Somers: I know it, Judge.

Leon Ellis—for Government—Cross

Your Honor, this is cross-examination, I am attacking this man's credibility, nothing else.

The Court: Tell him what you told Mr. Starkey as best you can remember it.

The Witness: Would you mind repeating the question, please?

By Mr. Somers:

Q. Judge Wright has told you to tell us what you told Starkey and what Starkey asked or told you, as near as you can remember, when you were in Starkey's office on April 25th? A. Well, he asked me about—in other words, I told him I was willing to tell everything I know about this. I volunteered this information myself and took—

Q. You volunteered this information, is that correct?

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Mr. Starkey: Your Honor, the question was, tell everything that was said. I object to the interruption.

Mr. Pogoda: I move to strike out the answer, if the Court please, as not responsive to the question.

The Court: You said you volunteered. So tell us what you told him.

The Witness: I volunteered to tell everything that I know about this.

The Court: Tell us what you said.

The Witness: And every person that he asked me about, did I know, and what connection I had with him, I told him yes, and told him about the dealings I had—

Mr. Somers: Wait a minute. Just a minute, please.

The Court: Do you want him to answer the question now or what?

Mr. Somers: Your Honor, I want to get it seriatim.

Mr. Starkey: No, your Honor. I object to that. I ask that the witness be permitted to answer the question.

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The Court: I sustain the objection.

The Witness: (Continuing) And he was asking me about different persons.

By Mr. Somers:

Q. What persons? A. What persons?

Q. Yes. A. Aiken, Colson—

Q. Just a minute. He said to you—

Mr. Starkey: Your Honor, I will object to the interruptions. He has not finished his answer.

Mr. Somers: I don't want to reduce this to—

Please permit me to conduct my own cross-examination.

The Court: Overruled.

Mr. Somers: Thank you, your Honor.

The Court: I want you to know that you are not going to take up this Court's time and waste this jury's time. You make your points with this witness and let him alone.

Mr. Somers: That is all I intend to do. I am not going to harass you.

The Court: I want to make it very clear to you that that is all you are going to do.

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Q. Schoolboy, he asked you about Aiken? A. He asked me about everybody, the persons' names that he called, he asked me—

Q. Tell me the names. A. He asked me about Colson.

Q. Jesse Colson? A. Yes. He asked me what relation I had with him, and I tried to explain it to him the best I could. He asked me about Duke, and what relations I had with him, and I tried to tell him the best I can, the best dates that I had.

Q. And he asked you about Icky? A. Yes.

Q. And he asked you about Sylvia Ferris? A. Yes.

Q. And he asked you about Winston Massiah, perhaps? A. Yes.

Q. And he asked you about Lenny Aiken? A. Yes.

Q. Just like that? A. No, not just like that. He asked me did I know Leon.

Q. Did he ask you if you knew Leon Aiken? A. No.

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Q. He didn't ask you if you knew Leon Aiken? A. No. He asked me did I know Leon. I said yes.

And he asked me what kind of dealings did I have with him, and I explained to him the best I could.

Q. Now, he mentioned these fellows by the names, I take it, that you have just given us? He said, "Duke." He didn't say "Maxie Anfield", or anything like that? A. I told you the best I could.

Q. The best you can remember? A. Yes.

Q. And did he also ask you about this particular transaction of February 12th for which you were arrested, February 12, 1958, the six-ounce deal? Did he ask you about that? A. I was in Mississippi February 12, 1958.

Q. You and I know that, of course, but did Mr. Starkey ask you about that? A. When I was arrested—

Q. Let's begin again. Let me show you the complaint signed by Mr. Murphy charging you with possession.

The Court: He has already seen the complaint.

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Did Mr. Starkey ask you anything about having six ounces of cocaine on February 12, 1958? Did he ask you anything about that at all?

The Witness: I don't remember.

The Court: He says he doesn't remember.

Q. You don't remember that? A. No.

Q. Well, now, you were concerned about your particular case for which you had been arrested the previous day, weren't you? A. What particular day are you talking about?

Q. Well, I don't want to confuse you. On the 24th of April, Schoolboy. A. 24th of what?

Q. On the 24th of April you were arrested and on the 25th, the following day, after you were brought down from West Street, you were arraigned—you know what an arraignment is, don't you? A. Yes, sir.

Q. You were arraigned before the United States Commissioner, Mr. Bishopp, I imagine Commissioner Bishopp, weren't you, downstairs here? A. Yes.

Q. And at that time this—well, now, before I ask you

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that, you had some experience with the law before this, with the criminal law, didn't you?

Mr. Starkey: Objection.

The Court: We have been through this before. Objection sustained.

Q. You have, haven't you?

The Court: I sustained the objection.

Leon Ellis—for Government—Cross

Q. You knew that you just couldn't be arrested and not be informed of the reason for your arrest, didn't you?

Mr. Starkey: I will object to that, your Honor.

Q. Did you know that?

Mr. Starkey: I will object to that as irrelevant.

A. No.

The Court: He said he didn't know that.

Q. But you did know when they read this complaint to you, in the Commissioner's office, that you were being charged solely and only, and with nothing else but possession of six ounces of heroin, or, rather, of cocaine?

Mr. Starkey: Objection to that, your Honor. It assumes a fact not in evidence, that the government's

criminal proceedings are limited to charges that are set forth in a complaint at the time of an arrest. It assumes that, and I think counsel knows it is not so.

The Court: I will overrule the objection. Ask the question again.

Q. You knew that this was the only thing that you were charged with, six ounces of cocaine, on the 12th of February, 1958? A. I didn't know that. I thought—Jesse Colson was telling me that I was charged with about 3½ kilos of cocaine, and he told me I was going to be on the indictment about fifteen or twenty papers, I don't know.

That is what I understood. I was charged with conspiracy of violating the narcotic act.

Q. I see. At the time of your arrest on the 24th of April you were fearful of being apprehended in connection with a conspiracy indictment that Jesse Colson had told you about, is that correct? A. I was what?

Q. You were afraid of being indicted, charged with participation in a conspiracy, lots of kilos and stuff? A. Yes, I was very scared about that. I was so scared until I called the FBI up and told them to come up and arrest me, and they called to 32nd Street Precinct, to the Narcotics

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Squad, and they came to my house and asked me what did I want to be arrested for.

I said I heard that the Feds was looking for me, and I said if they are looking for me I want to give myself up.

And they told me that they didn't have nothing in the FBI report, and just if anybody else comes and asks me that the FBI is looking for me, just give them his number. His number was in the 32nd Squad of Narcotics.

Q. Then I understand you knew, before you got this particular bust, that you were wanted by the Feds for this conspiracy, is that right? A. Jesse had told me.

Q. Incidentally, when did he tell you that? A. He told me that almost daily.

Q. That would be for six or seven months prior to this? A. Oh, yes.

Q. See, now, take it easy. Get your dates right. This was 1961. A. He told me a little after that he was indicted that they was looking for the whole syndicate, everybody was in it, they were looking for them.

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Q. Everybody was in it including you? A. Yes.

Q. How much do you weigh? A. How much do I weigh?

Q. Yes. A. About 168 pounds.

Q. And you are about five feet nine inches? A. Five eight and a half, something like that.

Q. Read the title of this indictment aloud? A. (No response.)

Q. Read it aloud. A. (Reading) "The grand jury charges on or about the 6th day of May, 1958, in the Southern District of New York, Winston Massiah, Jesse Colson"—

Q. No. Just the title. I don't want you to read the whole thing. Just this: United States of America against— A. (Reading) "United States of America against Winston Massiah, Jesse Colson, Mitchell Anfield, Granville Smith, Noel Maxwell, William Adams, John Henry Purry, Clarence White, Nick Holiday, Icky Thorn, Sylvia Ferris, John Doe, Leon"—

Q. John Doe, a/k, right? A. Yes.

Q. That means "also known as."

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All right, continue. A. (Continuing reading) "meaning thereby to describe"—

Q. No. Mention the name. "also known as" what?

Mr. Starkey: Your Honor, I object to—

Q. The name. Give me the name.

The Court: I will sustain the objection. If you want it read, read it aloud yourself.

Mr. Somers: All right, I will read it.

This indictment reads as follows:

"United States of America against Winston Massiah, Jesse Colson, Mitchell Anfield, Granville Smith,

Noel Maxwell, William Adams, John Henry Purry, Clarence White, Nick Holiday, Icky Thorn, Sylvia Ferris, John Doe, also known as 'Leon', meaning thereby to describe a Negro male of medium complexion, with black hair and a medium build, approximately 40 years old, approximately 5' 9" tall, and weighing approximately 165 lbs."

Q. Now, that Leon is you, isn't it? You are the man in this indictment described this way, aren't you, Schoolboy?

Mr. Starkey: Your Honor, I will object to that.

The Court: Do you know whether or not you

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are in this indictment?

The Witness: I don't know, sir.

The Court: All right, he doesn't know.

Q. Aren't you that man?

The Court: He said he doesn't know.

Q. You don't know. But you were fearful, at the time of your arrest, and just before, that you, with Jesse and all the rest, had been indicted, charged with conspiracy; isn't that correct? A. I don't know.

Q. You don't know? A. I don't know.

Q. Isn't that so?

The Court: He says he doesn't know.

Q. You don't know? A. (No response.)

Mr. Somers: Mr. Aiken, will you please stand up?

(Defendant Aiken rises.)

Leon Ellis—for Government—Cross

Q. How much would you say Mr. Aiken, this defendant, Leon Aiken, weighs?

Mr. Starkey: Objection.

The Court: I sustain the objection.

Mr. Somers: All right, Mr. Aiken, sit down.

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Q. Will you tell me about how big Leon Aiken, the man you have described repeatedly in these transactions, is? How tall? A. I don't know.

Q. You don't know? A. No.

Q. You saw him a number of times but you don't know? A. No.

Q. Would you tell us how much he weighs? A. I don't know.

Q. Would you tell us whether or not he was a man of medium—that would be not too dark, not too light complexion? You couldn't say that either, could you? A. No.

Q. You don't know? A. No.

Q. Incidentally, you don't even know, although you have told us repeatedly that you were in his car, what make of car it was; isn't that what your response to Mr. Pogoda's question was yesterday? You didn't know the make of the car? A. I don't know.

Q. And you didn't know the color of the car? A. I

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don't know.

Q. And you didn't know the year model of the car, did you? A. No.

Q. You didn't know any of those things? A. No.

Q. Now, you told us yesterday, in response to the examiner's questions, that you had been in Mr. Starkey's office eight or ten times; that's correct isn't it? A. Yes.

Q. So that between the 24th of April and June 6th when you made the second statement— Have you got that right, the 25th of April and June 6th? This, today, is the 22nd of June. So we are bringing you back, now, to June 6th. You were in his office then, weren't you? A. I don't know.

Q. Well, I will show you this. I don't want you to be confused. I will show you this statement again dated June 6th, your statement in Mr. Starkey's office.

With that in mind does that refresh your recollection that you were there June 6th? A. Yes.

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Q. And we know you were there April 25th because this statement indicates that date and we have no reason to disbelieve it.

Now, between those two dates you were there eight or ten times, weren't you? A. I don't remember.

Q. You don't know that? A. No.

Q. Now, do you know that this indictment was filed March 3rd, 1961 of this year; is that correct?

Mr. Starkey: So stipulated, your Honor.

Q. Did you know that? A. No.

Q. No one ever told you that? A. No.

Q. Did you know that Mr. Aiken, this defendant that you talked about yesterday, was first arrested on May 13th of this year, 1961? You didn't know that? A. No.

Q. You knew, of course, that Jesse Colson was arrested back in 1959, although you didn't know the date? You knew that, didn't you? A. Yes. I didn't know the date.

Q. Did Jesse Colson tell you that he had been talking

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to the Feds? A. Told me?

Q. Yes. A. No.

Q. He didn't tell you that? A. No.

Q. Did he tell you to talk to the Feds? A. No.

Q. No? A. No.

Q. You did just as you said, you volunteered? A. Yes.

Q. You wanted to relieve your conscience, is that your reason? Did you get religion? Just tell me why did you do it? A. Why did I do it?

Q. That's right, why did you do it? A. Well, I was tired of running.

Q. Tired of running? A. Yes.

Q. And actually you knew that all you were charged with, so far as the government was concerned, was this six ounces of cocaine that you were allegedly in possession of on the 12th of February?

Mr. Starkey: Objection.

The Court: The witness has said many, many

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times that he didn't know that. We know it is on the paper and that he was charged with it, but he said many, many times that he didn't know it.

Q. Now, no other charge had been brought to your attention by the Federal Government other than this, put it that way? A. But I know what Jesse told me.

Q. Just a minute. The Federal Government had not charged you with anything? Nobody had picked you up before this? A. I don't know.

Q. No? A. I don't know.

Q. And you knew that February 12th was Lincoln's Birthday, surely, didn't you know that? Do you know that February 12th is Lincoln's Birthday?

Leon Ellis—for Government—Cross

Mr. Starkey: Your Honor, I will object to the harping on this February 12th date. The witness has testified as to his knowledge insofar as that is concerned, and I submit that any further questions in this area are repetitious and irrelevant.

Mr. Somers: Nothing is irrelevant, your Honor, if I may respectfully submit, with respect to this cross-examination.

—1030—

The Court: I will sustain the objection. We have been over it many times.

Q. All right. You were down south on February 12, 1958? A. Yes.

Q. Is that right? A. Yes.

Q. So you would have an alibi, wouldn't you? You know about alibis, don't you, Schoolboy? Do you know what an alibi is? A. I went to bury my mother.

Q. You went to bury your mother? A. That is an alibi, a pretty good one.

Q. So you knew that they couldn't pin this rap on you, didn't you?

Mr. Starkey: Objection.

The Court: Did you know that you were charged with something on February 12, 1958?

The Witness: No, I didn't, your Honor.

The Court: Now he has answered that at least a half a dozen times.

Q. Now, Schoolboy, you told us that you have lived in Harlem for many years, and you have told us that you had some prior experience with narcotics, that is to say,

you saw it around a great deal of time, a great deal of it,

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in Harlem?

Mr. Starkey: Objection to a monologue, and objection to questions on questions and repetition.

The Court: Well, he said it yesterday. All right, go ahead.

Q. And you know something about what happens to guys who get caught and convicted of narcotic violations, don't you? A. I know, but I didn't know the penalty. I didn't know the direct penalty.

Q. You never knew the penalty? A. Not directly.

Q. Did you know it indirectly? A. No.

Q. Did anybody you know or ever heard of go away for violation of the narcotic laws? A. Yes.

Q. What did you hear about sentences, fellows going away? A. I didn't hear you.

Q. All the time you have been in Harlem, the years that you have been floating around in the numbers racket, you never heard of anybody being sentenced on a narcotic rap in Harlem, is that right?

—1032—

Mr. Starkey: I will object to the form of that question. It is a summation rather than a question.

The question, I submit, was bad in form. I object to it.

The Court: That is overruled.

Counsel wants to know whether or not you had ever heard of people who had been sentenced for narcotic violations.

The Witness: Yes. I had heard people say that

this fellow got five years, this fellow got ten, something like that.

Q. Did you ever hear of fellows getting 25 years? A. No. I read in the paper that some guys got 25 years, yes.

Q. Does that give you any feeling that this was a very dangerous business? A. Yes, I know it was dangerous because what I did was very dangerous, but three or four kilos, don't you think that is dangerous?

Q. I sure do think it is dangerous. I agree. A. And I agree with you.

Q. That this was very dangerous. You were in a very dangerous business. A. Yes.

—1033—

Q. And knowing you were in a very dangerous business, you knew that if you were caught you might get a very long term in prison? A. (No response.)

Q. You were not interested at all in the possibility of prosecution? A. I was just trying to keep from getting caught.

Q. You were interested in not getting caught? A. We were just interested in keeping from getting caught.

Q. But having been busted weren't you—do you know what "busted" means? A. Sure I know.

Q. Tell the jury what that is. A. "Busted" is when a guy gets picked up for something.

Q. Having been busted, weren't you concerned with the possibility of a defense, defending yourself? A. Being busted for what?

Q. For narcotics. A. (No response.)

Q. You never thought about being busted in this dangerous racket that you were engaged in? A. I only think

about not being caught. That is the only thing you think

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about.

Q. Not being arrested? A. Yes.

Q. And having once been caught, you felt that you would just unburden yourself? Was that your feeling? And you would tell everything you knew? A. I don't know what you mean by that question.

Q. Well, now, you are here in court, and you were in Mr. Starkey's office back in April telling a lot of things about a lot of people engaged in the narcotics racket. A. I told what I know and how I know it, and the best way I remembered what happened.

Q. Yes. All I want to know is, Schoolboy, why did you tell it. A. Why did I tell it?

Q. Did he hit you over the head with a brick?

Mr. Starkey: I submit that this question has been asked and answered.

The Court: Overruled.

Tell him again.

Q. Why did you tell?

Mr. Somers: Your Honor, I beg your Honor's pardon. He hasn't told us.

—1035—

Q. Tell us for the first time—

The Court: All right, just tell him.

Why did you tell Mr. Starkey and the other agents all about this?

The Witness: I told them because I thought I would get a break for myself.

Q. That's all I wanted to know. You thought you would get a break for yourself? A. Yes.

Q. So you don't feel very good about bringing in all these others, do you? A. Who brought in all the others?

Q. Well, you have implicated Icky Thorn, you have implicated Duke, you have implicated Aiken, and that doesn't make you feel very good, does it?

Mr. Starkey: Objection, your Honor.

Q. How do you feel about that?

The Court: I sustain the objection. Let us proceed now. You got an answer to your question.

Q. The answer is that you wanted to help yourself, isn't that so? That is what you are saying? A. Yes.

Q. And in helping yourself you wanted Mr. Starkey to be sure that you were cooperating and were going to tell

him everything that you knew, is that correct? A. I told him everything he asked me what I knew.

Q. And what you told him, of course, was true? A. To the best of my knowledge, yes, the best I could remember.

Q. And you were there eight or ten times between April 25 and June 6 so that you had time to recall, in that period, everything that happened in the '57-'58 transactions; is that correct? A. No.

Q. What do you mean, no? A. No.

Q. You were there April 24?

Mr. Starkey: The question was, "What do you mean, no."

Q. All right, answer that.

The Court: Can you answer that question?
The Witness: No, sir.
The Court: He said no, so let's proceed.

Q. Well, you had plenty of time to think over what you had told Mr. Starkey and what you were going to tell him between the 25th day of April and the 6th of June, didn't

—1037—

you? A. Well, these things don't ever leave your mind. You always wake up in bed and you think about the time you had this kilo, and the time—and that scares you.

Q. And you can remember other things, isn't that right? A. It comes back to you.

Q. It comes back to you? A. Yes.

Q. So that between April 25th and the 6th of June—the 25th of April and the 6th of June things came back to you, didn't they? A. Yes.

Q. So that when Mr. Starkey told you, on June 6th, Mr. Starkey said:

"Q. Now, your name is Leon Ellis? A. Right.

"Q. And you gave a statement where you answered some questions that I asked you on April 25, 1961 in this office with Agent Murphy also present and the same lady taking the notes on that occasion? Do you recall that? A. Yes.

"Q. Is that a true and accurate transcription of the questions and answers on that date? A. Yes."

—1038—

That was right, wasn't it? You were testifying in this second response that your first statement was accurate and true? A. The best I could remember.

Mr. Starkey: Your Honor, I will object to the characterization. He said it was an accurate and true transcript of the questions and answers given at that time. There was no question about the contents.

The Court: I think the jury understands. Let us proceed.

Q. All right. Now, incidentally, you said a few minutes ago that you called up the 32nd Narcotics Squad and said, "Come on over and get me." A. I called up the FBI.

Q. And at that time you were prepared to be arrested and to talk; isn't that correct? A. Yes.

Q. Didn't you prepare, however slightly, in your mind what you were going to tell them? A. I wasn't preparing to talk. In other words, the things that I did almost come back to my mind, I know who I did them with, and just about the approximate time, what I did, so I didn't have to prepare anything.

Q. Incidentally, why didn't you tell Mr. Starkey, on

April 25, that—

Did you tell Mr. Starkey, on April 25, when you were in his office on the first occasion, and you were telling him about Icky Thorn, and all the others, you told him about Leon Aiken, did you not? A. I didn't know Leon's name.

Q. You didn't know that Leon's name was Aiken, did you? A. No.

Q. When did you first find that out? A. In the paper.

Q. The first time you found out that Leon's last name was Aiken was when you saw a paper report, a newspaper report, of his arrest? A. Yes.

Q. Then you knew his name was Aiken? A. Yes.

Q. Up until that time you didn't know it? A. No.

Q. And then Mr. Starkey told you his name was Aiken on the 26th of June, didn't he? A. No.

Q. He said to you:

"Q. Do you now know his name to be Leon Royal Aiken?"

—1040—

A. I saw it in the papers. That is how I know.

Q. That's right, then, isn't it? A. Yes.

Q. The first transaction that you had that had any sizable sum of money with Aiken, I am speaking now, was that $5,000 deal? You told us again and again. A. Yes.

Q. And you are sure of that, aren't you? A. Yes.

Q. Now, do you remember this question by Mr. Starkey in your office, which was reduced to writing:

"Q. Was the amount of cocaine discussed? A. No. I will take it big.

"Q. Well, the amount ultimately delivered was about six ounces? A. Yes.

"Q. Did you receive the money in advance from him?"

Mr. Starkey: Your Honor, I am not clear as to the purpose of the reading of these questions and answers, but one was just skipped and—

Mr. Somers: I will read it all, if you like, Mr. Starkey, so that there will be no question about it.

Mr. Starkey: All right, sir. If counsel is going

—1041—

to read it, I would ask that he read it all, and if he wants to examine the witness about it, I request that he examine him.

The Court: If you want to read the statement, you may read it all.

Mr. Somers: Mr. Starkey is inferring that I am taking this out of context.

The Court: You can't skip around in it either, and then ask him questions about it.

Mr. Somers: I want the Court to understand, if I may say, most respectfully, Judge, that I am referring specifically to the first transaction. Mr. Starkey has this original transcript. He knows what I am referring to, and he can check me very quickly, that is, if I take this out of context.

If you feel that I am taking it out of context, I will be glad to read it and stop here and there.

The Court: Would you mind proceeding with your cross-examination, please.

By Mr. Somers:

Q. Now, do you remember, Mr. Ellis, Schoolboy, do you remember Mr. Starkey, again on the 25th, in his office, of April, discussing your first transaction directly with Leon, and Mr. Starkey's question was:

—1042—

"Q. Now, did there come a time, then, in the first month or two of 1958, when you talked to Leon about Colson's cocaine? A. Yes.

"Q. What did you tell Leon? A. I told him I know a fellow that is bringing in some stuff and if he is interested I can get him some."

Do you remember that? A. Yes.

Q. And Mr. Starkey's next question:

"Q. What did he say? A. He said yes, he would be interested in it."

Do you remember that? A. What month did you say that was?

Q. Well, Schoolboy, we are now talking about your talk in Starkey's office when you wanted to tell him everything about everything you knew, and all the people you knew. A. Would you mind reading it again, please?

Q. Yes. I will start again. Mr. Starkey had been talking to you for quite a little while before he reduced this to writing, is that correct? This wasn't typed—

The Court: Would you mind getting on to the cross-examination, please?

—1043—

Q. The question was:

"Q. Now, did there come a time, then, in the first month or two of 1958, when you talked to Leon about Colson's cocaine? A. Yes.

"Q. What did you tell Leon? A. I told him I know a fellow that is bringing in some stuff and that if he is interested, I can get him some."

Do you remember making that answer? A. Yes.

Q. Then Mr. Starkey's question:

"Q. What did he say? A. He said, yes, he would be interested in it."

Do you remember that? A. Yes.

Q. And then Mr. Starkey's question:

"Q. Was the amount of cocaine discussed? A. No. You know, he said, 'I will take it big'."

A. Yes.

Q. And then Mr. Starkey's question:

"Q. Well, the amount ultimately delivered was about six ounces?"

A. Yes.

Q. And your answer was "Yes", is that right? A. Yes.

—1044—

Q. Then the question:

"Q. Did you receive the money in advance from him?"

Mr. Starkey: Your Honor, again a question was skipped.

Mr. Somers: I will read it if he wants it.

Q. The following question—

The Court: Mr. Somers, let's agree that he made the statement and he gave the statement just as it is there.

Mr. Somers: That is not sufficient, I beg the Court's pardon. This is on credibility. This is cross-examination.

The Court: You better look to the jury about this cross-examination and see whether they think it is cross-examination.

Mr. Somers: Your Honor, I have to conduct the trial as best I see fit. I beg your Honor's pardon.

The Court: All right, proceed.

By Mr. Somers:

Q. Now, Schoolboy, then Mr. Starkey's question was:

"Was there any conversation between you and Leon in the beginning about how much he would be taking?

—1045—

A. He said he would take it all if it is pure stuff."

Do you remember that? A. Yes.

Q. Now Mr. Starkey's question:

"Q. Did you receive the money in advance from him?"

Do you remember that question, Mr. Starkey asking you: "Did you receive the money in advance?" A. Yes, I remember that question but I thought he was speaking about that particular time.

Q. I beg your pardon. A. I thought he was talking about that particular time I was talking to Leon, did I receive the money in advance, and that answer is no.

Q. No. I don't understand you. You thought what? I didn't quite follow you. When he was questioning you, you say you misunderstood Mr. Starkey? A. You want me to give it to you over again?

Q. Yes. I didn't quite get it. A. He was asking me did I receive any money in advance, and I thought he was talking about that particular time that I was talking to Leon that we was talking about cocaine.

Q. No, no. He said to you, again, let me repeat Mr.

—1046—

Starkey's question— A. I just told you what I thought that he was saying. I made a mistake and said—

Q. You made a mistake, didn't you? A. Yes, but I—

Q. Well, now, look. In other words, you know that your testimony in this court, after repeated interrogation by these cross-examiners, was different from your statement to Mr. Starkey; now you know that?

Mr. Starkey: Objection, your Honor. I think that is a question that the jury is entitled to decide and that—

The Court: I sustain the objection. You are arguing with the witness.

Q. Then you told Mr. Starkey that you delivered six ounces of stuff to Aiken for $3600, that is $600 an ounce, didn't you tell him that?

Mr. Starkey: I will object, your Honor, to counsel's characterization or paraphrasing of the questions. If he is going to ask about questions at this time, I would ask that the questions and answers be read.

The Court: Well, he has read them about four times. We have had enough of them.

—1047—

Answer the question the best way you can.

Q. How do you explain that, that you told Starkey you sold, on your first deal with Mr. Aiken, with Leon, you sold six ounces at $600 an ounce? That is what you sold and that is what you delivered, and you told us in court again and again, that you got $5,000. A. Well, I think that question was—Mr. Starkey asked me how much the cocaine was selling for and I told him $600 an ounce. At $600 an ounce it would be $3600.

Q. $3600? A. $3600. That was the question that I answered of Mr. Starkey at that time. And if you read down further I think I told him what was the thing—

Q. Yes. I know. I can read that and we will read it to the jury when the time comes.

Now, Schoolboy, then you told Starkey, on April 25 of this year, that you had sold $3600 worth of cocaine, or at least six ounces, at $600 an ounce, in your first deal with Mr. Aiken. That is true, isn't it? That is what you told him? Whether you did or not, that is what you told him, isn't it? Yes or no. A. Yes. I think he asked me how much the cocaine—

Q. No, no.

—1048—

The Court: Just a minute. You asked a question. Let him answer it.

A. He asked me how much cocaine did Leon get in the first delivery.

Q. How much did you say? A. I told him approximately six ounces.

He asked me how much would that be an ounce. I told him what it sells for, $600 a ounce, but Leon got a wholesale price on the deal.

Q. That's right. Leon got six ounces, which normally would cost $600 an ounce, which would be $3600, but he got it wholesale, so he paid, for six ounces, $5,000. That is $850 an ounce. A. He paid $2500.

Mr. Starkey: First of all, it says "approximately 600."

The Witness: He paid $2500 for it.

The Court: All right. Let's proceed.

Q. You just told us—did I understand you to say that you don't know whether you are the Leon in this indictment? A. No.

Q. Now look over this indictment, Schoolboy, and read

it over to yourself. Take as long as the Court will permit

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you. A. I just looked over it before.

Q. You looked over the whole indictment? A. No. I looked over the names.

Q. Look again. Look at the names. A. I did that before.

Q. You don't want to do it now. A. I did that before.

Q. Do you see, anywheres in this indictment, the name, anywheres in this indictment, either as a conspirator, or as a defendant, or mentioned in the overt acts of this indictment, the name Leon Ellis? Do you see that? A. (No response.)

Q. You don't see that?

Mr. Starkey: Your Honor, I will object. The indictment speaks for itself.

The Court: I sustain the objection.

Mr. Somers: Your Honor, I am merely using the indictment for cross-examination.

The Court: I sustain the objection.

Mr. Somers: Exception.

Q. Nowhere in this indictment does that appear?

Mr. Starkey: Your Honor, counsel has ignored

—1050—

the Court's ruling.

The Court: Mr. Somers, I am putting you on notice. Now proceed.

Q. Schoolboy, I ask you again, bearing in mind that you did not see your name in the indictment mentioned

anywheres except insofar as the title says, "Leon, also known as John Doe", and the description of a male Negro of light complexion, five feet nine in height, approximately 165 pounds, do you still say that that is not you in that indictment?

Mr. Starkey: Objection.
The Court: I sustain the objection.
Mr. Somers: Exception.

Q. All right. Now, did you have any other customers besides the ones you have mentioned? Did you ever sell any narcotics during this period of time, Leon, to others? A. No.

Q. The only people you ever did business with was with whom? A. Leon and Tilly.

Q. Leon and Tilly? A. Yes.

Q. Those were your only two customers? A. I couldn't

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get it small.

Q. You mean you didn't want to do business— A. No. I couldn't because the fellows that I was doing business with wouldn't give it to me. I couldn't get no small stuff like spoons and like that, because they wouldn't let me have it.

Q. Tell me, Schoolboy, who were these fellows you were doing business with that wouldn't give it to you? A. Jesse Colson.

Q. Jesse Colson was your only source? A. Well, he told me Duke was his partner, but later, when he was getting the big shipments Duke was out.

Q. Now, with respect to that, you testified yesterday that after you came back from Mississippi you met Duke and

Duke said to you that he was going to deliver a package to Leon Aiken, and you went with him and helped him deliver the package, or you accompanied him, anyway; you did tell us that, didn't you? A. No, I didn't.

Q. You didn't tell us that? A. I told—I didn't tell you anything about Leon Aiken. I said Duke said that he had a package for your man and we went around to 136th

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Street and went up to a friend of Duke's house, we stayed up there approximately an hour and a half, and I came down and saw Leon, and we got in his car and drove off, and Duke give Leon the package and Leon gave him some money, and I went down to Duke's house and he gave me $75, and I went back uptown.

Q. That's right. I recall just what you said, Mr. Ellis. Ellis.

Now, why did he give you $75? A. Well, for going with him.

Q. Just for going with him? A. Yes.

Q. You got $75 just for going with him? A. Yes.

Q. That's all? A. Well, maybe he liked me or something.

Q. Or maybe he liked you? A. Yes.

Q. Do you think he liked you? A. I don't know.

Q. Did you like him? A. I don't like no boys.

Q. You don't like no boys? A. I don't like boys. I like girls.

Q. Very good. Very good. You didn't have any ani-

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mosity, any hatred, against Duke, did you? A. No.

Q. And you haven't now that you are testifying as you are, you have no hatred against Duke? A. No.

Q. Or Jesse Colson? A. No.

Q. Now, did you think Jesse Colson was a reliable man to work with? A. I didn't give it any idea.

Q. Did you trust him? A. Not too much. You don't trust nobody around cocaine. You only trust yourself. Who can you trust?

Q. Cocaine dealers are not trustworthy. You have to watch out for your own self, isn't that correct? Don't you? A. (No response.)

Q. Now you testified that after you had this talk with Duke, during your talk with Duke, that Duke told you that he had had a falling out with Jesse, Jesse was cheating him; do you remember saying that, that Jesse was cheating him? A. What talk is that that you are speaking of?

Q. All we know from your testimony is that when you came back from Mississippi, after your mother's funeral,

you met Duke and Duke and you had a talk, and in the course of that conversation Duke told you that Jesse had cheated him; didn't you tell him that Jesse had cheated him? A. When I got back from Chicago, Jesse came down to my house and told me that he didn't have any more coke, that him and Duke had turned the last deal with Leon, and him and Duke had an argument about the car, and he told me to go down to Maybelle's mother's house to see if I could see Duke, and see what he was angry about, and that is the time we had the discussion, me and Duke.

He told me that Jesse was cheating him in the business and was cheating him out of money.

Q. Duke told you that Jesse was cheating him? A. Yes.

Q. And you also testified that in this prior transaction

that you had had over at Tilly's with Aiken, that Aiken complained that it was short? A. Yes.

Q. So now you knew that Jesse was dealing in short weight, and that Duke, his partner, who you thought was his brother—didn't you think that Duke was Jesse's

—1055—

brother? A. Yes, at the time.

Q. And that Duke, Jesse's own brother, said that Jesse was a cheat? You knew that? You had heard that, didn't you? A. Well, are you going back? You are not going forwards now.

Q. You go on and tell us. A. You want me to tell you about me and Tilly and Leon, when we was up in this little room and the stuff was short, it was a little short, and Leon asked me could I get any contact with my man, and I told him no, and he said, "Oh, that's all right," and Tilly asked Leon where he was going around 136th Street, and Leon said yes, and he said, "Why don't you let Schoolboy take it?"

And he said, "He ain't never been busted."

Q. Hold it, Schoolboy. Hold it. We are talking now only about— A. I am trying to answer what you asked me.

Q. I will ask you now, on that first occasion the very first time you met Leon was when you delivered $300 worth of stuff down to Tilly's, isn't that right? Leon came in later? Isn't that your testimony? A. Yes.

Q. And then the stuff was weighed or spooned, or how-

—1056—

ever you work with cocaine, and Leon complained that it was short? A. Yes, he said it was a little short.

Q. So that you knew then that Leon was accusing Jesse

of shortweighting him; isn't that right? A. Well, it could have been either way. He was accused, yes.

Q. And then later Duke told you that, and Duke, who you thought was Jesse's brother, he told you that Jesse had been cheating him in deals that Duke and Jesse had together? You heard him say that to you, too, didn't you?

The Witness: Would you mind repeating that?

(Question read.)

Q. Duke and you had a talk, if I recall correctly; Jesse said, "He is mad at me; go down and talk to him," or something like that, and you went down to Duke's girl friend's mother's house and you saw Duke; that's correct, isn't it? A. Jesse told me that Duke was mad at him.

Q. Now wait a minute. But you saw Duke right after that, didn't you? A. If you let me answer it, I will answer it for you.

Q. Wait a minute. You saw Duke shortly after Jesse

told you that Duke was mad at him, isn't that correct? A. I am going to tell you how it happened.

Q. We don't want to hear it again. We have heard it. Now you did see him then, and you spoke to Duke; isn't that correct? A. Yes.

Q. And Duke told you, amongst other things, that Jesse had been cheating him, robbing him; didn't he say that? A. He suggested it was Jesse who had been cheating him in the business.

Q. Now you had two complaints in your short experience with Jesse, one from a customer and one from a man you thought was his own brother.

And you know, you just testified, that nobody trusts anybody in the narcotics racket, you look out for yourself. When Jesse—

Mr. Starkey: Your Honor, again I think we have something of a monologue here, and a summation.

The Court: Mr. Somers, just ask him questions.

Mr. Somers: I will try to, Judge. I am sorry.

The Court: Suppose we take a five-minute re-

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cess.

(Short recess.)

By Mr. Somers:

Q. Schoolboy, do you remember the second kilo that you spoke about? That would be the Chilean people that came up, the man and woman; do you remember that? The time late October of '58 when this other delivery came from Chile to Colson at his house? Do you recall that episode? A. Yes, around the last of September.

Q. I am not particularly concerned about the date but— A. Something like that.

Q. Yes. Now, you were up at his house when these people came in, the man and woman? A. Yes, sir.

Q. And do you remember when you spoke to Starkey and were telling Mr. Starkey all about this that you discussed that second kilo shipment with him, didn't you? A. (No response.)

Q. You discussed it with him, didn't you? A. He asked me questions and I told him, yes.

Q. Now, this was a shipment, a very large shipment, that was being smuggled in from abroad, from South

—1059—

America, wasn't it, that you were talking about? A. Yes.

Q. And Mr. Starkey spent some considerable time going over the details of that with you? A. I don't know.

Q. You don't remember? A. (No response.)

Q. Now, you had eight or ten visits there, and didn't he, during those times, discuss that shipment of a kilo from South America with you, the second kilo? A. He asked me the persons, and I told him the best I know how.

Q. He asked you a lot of questions about it, didn't he? A. He asked me questions.

Q. And he showed you pictures in connection with the people that brought the stuff up, didn't he? A. No.

Q. Well, you said he did? A. Not at that time, no.

Q. But later, in June, is that it, June 6th? A. I don't remember.

Q. But he showed you pictures of the people, and you identified them as the people who brought the stuff up,

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isn't that correct? A. Yes.

Q. Now, do you remember Mr. Starkey saying to you in his office—and we are talking now of this second shipment, when the man and woman brought the shipment up from South America, does that fix it in your mind? A. Is that what you are talking about?

Q. Yes. A. Yes, the separate shipment.

Q. That was the time the man and the woman came up, and not the two women? A. Yes.

Q. The first time it was two women? A. Yes.

Q. Now, this is the man and woman? A. Yes.

Q. Have you got it clearly in your mind? A. Yes.

Q. Do you remember it very well? A. Yes.

Q. You remember Mr. Starkey said to you, "And you

were present when the man and woman who brought the next kilo in arrived at Colson's house?"

Do you remember him asking you that question? A.

—1061—

Was I present at the house?

Q. Yes. A. Yes.

Q. And you were, weren't you? A. What?

Q. You were present? A. Yes.

Q. Your answer was then, "I wasn't present when they arrived, but I was present shortly after they arrived."

Was that your answer?

Mr. Starkey: May I have the page, please?

Mr. Somers: That would be page 3 of your statement, Mr. Starkey. I am reading from your statement of April 25, page 3, at the bottom.

Q. You were not then actually present, were you? A. I didn't understand the statement, what you are saying. I was present with the people in the house. I was present with the people in Jesse Colson's house when they was unloading the kilo, was taking it out of the bag and giving it to Jesse and he was giving it to me.

Q. Now just please respond to my question, Mr. Ellis. Again we are speaking now of your testimony when you

—1062—

were telling Mr. Starkey everything in connection with these people and the shipment from South America.

Mr. Starkey said to you, "And you were present when the man and woman who brought the next kilo in arrived at Colson's house."

Do you remember him making that statement to you in that form? A. Maybe he did and maybe I refreshed my

mind and told him exactly like it was before maybe five minutes difference by being present, but I was there during the time that they were there. They took it out of the bag and gave it to Jesse and Jesse gave it to me, and I took it in a room that had two big jars—

Q. I am not talking about that, Schoolboy; I am talking about what happened when you came down to Colson's apartment, when you came up to 225th Street where Colson lived, in response to the call that you received at Carter's Bar, and you went up there. Now you tell us again what happened.

The Court: He has already told you that, and he told you several times, so let's get on to something else.

Q. Your answer to Mr. Starkey's question was as follows:

—1063—

"I wasn't present when they arrived, but I was present shortly after they arrived."

Do you remember telling him that? A. I don't remember.

Q. Well, you don't remember too much about that except what you testified to about the shipment being transshipped into jars, is that it? A. (No response.)

Q. You told us you were not afraid of Jesse; is that correct? A. That's correct.

Q. You were not physically afraid of him? A. No.

Q. You are not afraid of Jesse, physically afraid of him? A. No.

Q. Now, on the occasion of the third transaction that

you personally had to do with, that would be the first one with Tilly, the second with the $5,000 that you testified to in this court, and the third was the $12,000 or $14,000 shipment, the sale— A. No. The third was the time me and Duke delivered it.

Q. Well, then, we will call it the fourth See, I want you to know what I am talking about. A. I want to know

—1064—

too.

Q. It was about Colson, which would be the third with Colson but the fourth deal you testified about.

Now, you thought that there was $14,000 paid, didn't you? A. Yes.

Q. For that? A. Yes.

Q. Colson told you there was $12,000? A. He told me later.

Q. And he gave you your cut on the basis of $12,000, not $14,000? A. I don't know what dividends or what percentage he gave me, because I ordered so much and he had a little black book, so he just said, "Your cut is such and such," and I took it like that.

Q. You didn't care about the money one way or the other? A. Well, he was the boss. How can I do anything with that? He just gave me the figures.

Q. And you accepted them? A. Yes, I accepted them.

Q. Even though Duke had told you that he was being

—1065—

cheated by him, and you had had Tilly's complaint of short weight, you accepted Colson's figures without question?

Mr. Starkey: Objection as to form.

Q. Did you accept them?

The Court: You did accept them, did you?

A. Yes.

Q. Again, on the next shipment you accepted the figures without question? A. Yes. I always accepted his figures.

Q. Even though you were not afraid of him? A. No.

Q. You were willing to take whatever you could get out of this? A. Sure.

Q. You thought this business was better than the numbers racket when you went into it?

Mr. Starkey: Objection.

The Court: Sustained.

Q. Did you think that was a better way of making money than the numbers racket?

Mr. Starkey: Objection.

The Court: That is the second notice.

Mr. Somers: I beg the Court's pardon. Can't I

—1066—

talk to him about his prior occupation, your Honor?

The Court: That is your second notice. Proceed.

Q. When you were in—you told us yesterday that there were some numbers cases pending against you right now, didn't you? A. Yes.

Q. And where are they pending? A. I got one case in Centre Street.

Q. Special Sessions? A. No. General Sessions Court.

Q. General Sessions? A. Yes.

Q. Are you charged with a felony? A. Yes.

Q. Can you tell us the nature of it? A. It is 974-A. It came under New York Law September 1st that anyone having over a hundred bets it is a felong, a hundred bets. You can have a combination, unless you have—over a hundred bets, it is a felony.

Q. When were you arrested on that? A. September 1st of last year.

Q. Did you tell Mr. Murphy or Mr. Starkey anything about that?

—1067—

Mr. Starkey: I will object to this, your Honor. This is not even a conviction.

The Court: What is the purpose of this?

Mr. Somers: I don't want to say it in front of the jury.

The Court: You may.

Mr. Somers: That this man expects the government to help him over that.

Mr. Starkey: I will permit counsel to ask that question without objection.

By Mr. Somers:

Q. Did you mention that in any way to the federal people when they talked to you about this? A. They asked me about my conviction and arrest, and I told them at the time of my—when I was getting fingerprints.

Q. When you were being fingerprinted down at West Street? A. Yes.

Q. You told them that you had a felony charge pending against you in Centre Street? A. No.

Q. Well, what did you tell them about it? A. I told them I had a case in court.

Q. And in General Sessions? A. Yes.

—1068—

Q. And did you speak about that case to anybody in the federal government? A. I don't remember.

Q. You don't remember? A. No.

Q. Was there anything ever said about maybe you can get some help over there if you testify here? A. No.

Q. Did you have that in mind at all at any time? A. No.

Q. And you are not looking for any assistance here over there in General Sessions, is that right? A. No.

Mr. Starkey: Objection.

The Court: He said no.

Q. When you were being questioned by Starkey during these eight or nine times you told Mr. Carluccio yesterday—that would be the first one who cross-examined you—that Starkey was telling you a few things; didn't you say that? A. I don't remember.

Q. You don't remember that? A. No.

Q. Was Starkey telling you about this case when he was

—1069—

talking to you about it? Was he telling you what the government knew about it? A. I don't remember.

Q. You don't recall whether Starkey, in these eight or ten conversations, was telling you what the government had in this case on these various people? A. I don't know.

Q. Was Jesse Colson there at the same time you were being questioned? A. I don't remember.

Q. You don't remember that? A. I don't remember.

Q. Now, the traffic in narcotics, from your experience, is kept kind of dark, isn't it, by the peddlers?

Mr. Starkey: Objection.

Q. They don't go around openly telling people they are in the narcotic business, do they?

Mr. Starkey: Objection.

The Court: The witness has said many times that it is a secret business.

Q. It is a secret business.

Now you have testified that you repeatedly, on every occasion, if I am correct, saw and spoke to Leon at 136th Street between Seventh and Lenox Avenues? A. Yes, sir.

—1070—

Q. And that would be eight or ten times at least? A. Yes.

Q. And so that every time you wanted to get in touch with Leon Aiken you would go down to 136th Street and that is where you would find him? A. Yes.

Q. Did it ever enter your mind that this might be a dangerous thing, to go to the same place all the time to see a big-time narcotic peddler? Did you ever think of that? A. No.

Q. That never entered your mind? A. No.

Q. Now, you know that there is, from your own knowledge, a great deal of narcotic peddling going on in Harlem, don't you? A. (No response.)

Q. Do you know? A. No.

Q. You don't know that? A. No.

Q. Did you ever hear of marihuana? A. Yes.

—1071—

Q. Do you know what marihuana is? A. Yes.

Q. What does it look like?

Mr. Starkey: Objection.

The Court: I sustain the objection.

Q. You know that there is a good deal of marihuana peddling in Harlem, don't you? A. No.

Mr. Starkey: Objection.

Q. You don't know that?

The Court: He says no, he doesn't know that.

Q. You don't know that, do you?

The Court: He said no.

Q. Do you know whether there are a lot of bulls in Harlem from the Narcotic Squad, a lot of cops in Harlem from the Narcotic Squad?

Mr. Starkey: Objection.
The Court: Overruled.

A. I don't know.

Q. You don't know whether there are a lot of cops from the Narcotic Squad that patrol Harlem? A. (No response.)

Q. You don't know that? A. I don't know that, but I assume so, yes.

—1072—

Q. You assume so? A. Yes. There are a lot of precincts up there. There are a lot of precincts all over New York.

Q. And a lot of cops floating around? A. Yes.

Q. Plainclothesmen? A. I don't think you have to be a narcotic agent to arrest somebody with narcotics. I think any officer, to uphold the law, that sees a person with narcotics, can arrest him.

Q. I know that, but— A. I think I know it too.

Q. Pardon me? A. I don't know.

Q. You don't know about—you can't say of your own knowledge, whether— A. I think plainclothesmen—I don't think the average guy would know him, so how would I know there is a lot of plainclothesmen around? I think they are supposed to be kind of secret.

Q. That's right. Plainclothesmen are secret so you don't know when they will pop out and make an arrest; is that correct? A. (No response.)

—1073—

Q. Isn't that correct? A. (No response.)

Q. You never know when a plainclothesman will appear on the scene to make a bust?

Mr. Starkey: Objection.

The Court: You don't know that, do you?

The Witness: No, sir.

The Court: He doesn't know it.

Q. You have testified that you were always afraid that you might be arrested?

Mr. Starkey: Objection. Repetitious.

Q. You testified that you have, on a couple of occasions, made deliveries to a fellow by the name of Mersh; is that correct? A. Yes.

Q. And this fellow Mersh was designated to you, or pointed out to you by Aiken, this defendant; is that correct? A. (No response.)

Q. You don't know Mersh yourself? A. I have seen him a lot of times, yes.

Q. You have seen Mersh a lot of times? A. Yes.

Q. Where did you see him? A. 136th Street.

—1074—

Q. You mean 136th Street? A. That's what I said, 136th Street, between Seventh and Eighth.

Q. I beg your pardon? A. Between Lenox and Seventh.

Q. He frequents that neighborhood? He is there a lot? A. I see him in the skin joint a lot when I am around that way.

Q. He is readily available; he is around a good deal, is that it? A. Yes.

Q. Did you tell Mr. Starkey and Mr. Murphy about this man Mersh?

Mr. Starkey: Objection.

The Court: That is overruled.

A. Did I tell Mr. Starkey?

Q. Yes. Did you tell Mr. Starkey or Mr. Murphy, the agent? A. Mr. Starkey asked me about this delivery, and I told him that me and Jesse came from his house down to 136th Street, and we walked down the block, and Leon was in his car—

Q. No. We are talking about Mersh. A. Can I finish,

—1075—

please?

Q. No. Just tell me—

The Court: It will hurry this along if you will just answer yes or no or "I don't know" whenever possible.

The Witness: Did I tell Mr. Starkey about Mersh?

Q. Yes. A. Yes, I told him about this delivery that I gave to Mersh.

Q. And you told him that Mersh was well known in the area? You often saw him at 136th Street, and you often saw him in the skin joint? You told him that, didn't you? A. I told him that I seen Mersh around, and I have talked to Mersh around 136th Street.

Q. Did you tell it to Mr. Murphy too? A. I don't remember.

Q. On the occasion that you made this statement to Mr. Starkey did you tell him anything about Duke? A. I don't remember.

Q. What? A. I don't remember.

Q. Would you say that you didn't tell him anything about

—1076—

Duke? A. I don't remember.

Q. I don't hear you. A. I don't remember.

Q. You don't remember? A. I don't remember.

Q. But you say you told him everything you knew about the various people, didn't you? A. I told him what he asked me.

Q. You only told him in response to a question you would give him an answer, is that what you are telling us? A. People's names that he asked me about—

Q. He asked you— A. He asked me what kind of—did I know this person, and what kind of dealings that I was doing with this particular person.

I answered and told him and explained the dealings and the connections that I had with these people.

Q. And did he ask you—I think you were—your testimony yesterday, or the day before, was that amongst others he asked you if you knew Duke, didn't he? A. I don't remember.

Q. Wasn't it your testimony that he asked you did you

know a fellow by the name of Duke, amongst other names?

—1077—

A. I don't remember.

Q. And you don't remember now, one way or the other, whether you told him anything about Duke? A. He asked me what kind of dealings I had with Duke, and when was the last time I seen Duke, and I told him, yes.

Q. And you told him about your dealings with Duke? A. (No response.)

Q. Now, I show you this statement of April 25 of Mr. Starkey's and will you tell me whether anywheres in that statement you see any reference to Duke?

Mr. Starkey: Objection, your Honor. The statement is in evidence. It speaks for itself.

The Court: I sustain the objection. The statement speaks for itself.

Mr. Somers: I beg your Honor's pardon, but can't I—

The Court: I said the statement speaks for itself.

Mr. Somers: Exception.

Mr. Starkey: I will stipulate, however, your Honor, that there is no question or answer about Duke in the statement, if that will help Mr. Somers.

—1078—

Mr. Somers: Thank you, Mr. Starkey.

The Court: All right, proceed.

Mr. Somers: The statement speaks for itself.

By Mr. Somers:

Q. At the time Mr. Colson, Jesse, asked you to use your godmother's telephone because his phone was tapped, were you living with your godmother? A. At that time?

Q. Yes. A. No.

Q. You were not? A. No.

Q. Did you ever see the telephone bill? A. Did I ever see the telephone bill?

Q. Yes. Your godmother's telephone bill? A. Yes.

Q. And that bill showed a call to Chile? A. I don't remember.

Q. You don't remember that? A. I don't remember.

Q. And you said that these reports that you were going to get from Colson on the arrival of the shipments was a telephone call whereby he was going to say to you, "How are you?" And then that was the signal for you to

—1079—

go up to his house, something like that; is that correct? A. Yes.

Q. At this time in 1958 you were actually working in this cleaning and dyeing store, weren't you? A. It actually wasn't a job for me. I would just go in any time I get ready and help around the store, and come out. I go in and walk out when I get ready. It wasn't actually a job for me. I was just—

Q. It wasn't actually a job then? It wasn't actually a job then? A. No.

Q. You told us that all the records of the store had been destroyed? A. Yes.

Q. Is that right? A. Yes.

Q. And was there a telephone there? A. No.

Q. There was no phone in that store? A. No.

Q. And how far was that store from Carter's Bar? A. The next block, about half way of the block.

Q. You spent most of your time in Carter's Bar, I take it?

—1080—

A. Around there frequently, yes. Every day just about

approximately the biggest portion of the day was around in that neighborhood.

Q. Now, I want to ask you just one or two questions, Schoolboy, and we will be through, about this fellow Tilly. Tilly, of course, is a man, isn't he? A. Yes.

Q. A white man? A. No. He is a colored man.

Q. A colored man? A. Yes.

Q. Well known in Harlem? A. Well, I would say fair.

Q. Have you often seen him? A. Yes.

Q. Do you know where he is now? A. No.

Q. When was the last time you saw him? A. I don't remember.

Q. You don't remember? A. No.

Q. Did you tell Mr. Starkey about Tilly? A. I told Mr. Starkey about how that I had connections with Tilly. Yes, I told him that.

—1081—

Q. You told him about Tilly? A. Yes.

Q. And you also told him where this connection with Tilly took place, the house on 94th Street, I think you said? A. (No response.)

Q. That is right, isn't it? A. Me and Tilly, we left the Woodside Hotel, and we went to 225th Street, I made a call to Jesse, about the cocaine—Tilly wanted to go with me.

The Court: Ask him a specific question.

Q. This transaction where Tilly received this stuff and complained about the quantity, or at least Mr. Aiken did, the first time you saw Aiken was on 94th Street, you say? A. No.

Q. Well, where was it? A. It was on 141st Street between Seventh and Eighth.

Q. When you went up there there was a lady there? A. A lady opened the door.

Q. Do you know who that lady was? A. No.

—1082—

Q. No idea? A. No.

Q. That wasn't Sylvia Ferris? A. No.

Q. Did you ever see that lady again? A. No.

Q. That lady was present when Aiken came in, or had she left? A. I don't remember.

Q. You don't remember? A. No.

Q. But Tilly was there, and Aiken was there, and you were there? A. Yes.

Q. Now, was Tilly a narcotic peddler? I am not sure about Tilly. Will you tell me what his business was? What was Tilly's business?

Mr. Starkey: Objection, your Honor. I don't think there is any foundation for asking this witness that question.

The Court: Do you know what his business was?

The Witness: No.

The Court: He doesn't know.

—1083—

Q. How did you come to meet Tilly? A. I seen him around the block every day.

Q. And how did it come about that you did this transaction with Tilly? A. He asked me, he told me that he seen me ride around with the man bringing in all the good cocaine, and asked me could I get him some, and I told him I would see what I could do for him.

Q. Did you think Tilly was a user? A. I didn't know what he was.

Q. Did you have any idea whether he was a user or a peddler? A. No.

Q. You didn't think that at all? A. No.

Q. Would, normally, a user buy $300 worth at a clip? A. I wouldn't know.

Q. You wouldn't know that? A. No.

Q. Now—at any rate, continue. Tilly said he saw you running around with Colson, and he knew Colsen was a big operator. Now go on from there. A. He knew that Colson was a what?

—1084—

Q. Well, Colson was in the narcotics traffic. A. He told me, he said, "Man, you're riding around with the man bringing in all the good cocaine." He said, "Why don't you get some for me?" or something like that, or "Why don't you pick up some for me?" or something like that.

And I told him I would let him know, you know.

Q. And then you got $300 from Tilly? A. Yes. Later on he asked me could I get some coke.

I told him I would see about it.

Q. Go ahead. A. And then he told me to meet him at the Woodside. I met him at the Woodside and we was talking, and he said he wants some coke.

I said, "Okay, I'll see what I can do."

And he wanted to go with me, and I said, "The man ain't going to trust nobody but me because he don't want nobody around him, because one of his friends got stuck up in the business, and he's not going to trust nobody."

Q. You told that to Tilly? A. Yes.

—1085—

Q. You told that to him? A. Yes. He said one of his friends got stuck up in the business, and he is not going to trust nobody but me to the stash or around him, and nobody is going to get near him.

Q. And Tilly gave you the money? A. Tilly demanded

to go with me, and I told him I would take him part of the way with me.

Q. Never mind that. We have been through that. Tilly gave you the money, didn't he? A. I told Tilly that I would take him part of the way with me—

Q. Just a minute. Did you get any money from Tilly? A. Yes.

Q. How much? A. $300.

Q. And what did you deliver for that? A. What?

Q. What did you deliver for $300? A. I don't know exactly how much it was.

Q. And this subsequently was measured in Tilly's apartment, or someplace where Tilly brought you; is that correct? A. Yes.

—1086—

Q. And then Aiken came in? A. Aiken was doing the measuring.

Q. But he wasn't there when you got there, was he? A. No.

Q. He came in later? A. Yes.

Q. And you were there, weren't you? A. Yes.

Q. Well, did Aiken ask Tilly who you were? A. No. He came in and spoke to me.

Q. Aiken came in and spoke to you? A. Yes.

Q. What did he say to you? A. "Hi."

Q. Just "Hi"? A. Yes.

Q. And then just measured out the cocaine? A. No. He asked Tilly, "Did you get the package?"

And Tilly told him, "Yes."

And he gave it to Leon, and Leon measured it out.

Q. Well, did you understand by that conversation that Aiken knew that you were the man that supplied Tilly with the cocaine? A. I don't know.

—1087—

Q. Did it strike you strange that Tilly would let his big man, Aiken, meet with you, who were a supplier?

Mr. Starkey: Objection.

Q. Did that enter your mind?

Mr. Starkey: Objection.
The Court: Overruled.

Q. Now, Tilly is a narcotic peddler. Let me explain this clearly to you.

You are a supplier. Aiken comes in and Tilly introduces you, you say, and he says, "Hi". Is that what happened? A. Tilly didn't introduce me. Leon came in and he said, "Hi."

Me and Leon had been speaking for a few years, "Hello. How are you doing?" or something like that.

Q. Now, you have known Leon for a few years—

Mr. Starkey: Objection to that form, your Honor.
The Court: I sustain the objection. He has testified to this several times.

Q. And in your presence Leon measured out this cocaine? A. Yes.

—1088—

Q. Didn't ask what you were doing there at all? A. No.

Mr. Somers: That is all I have of this witness.
The Court: Any redirect?
Mr. Starkey: Yes, your Honor.

I will first ask that this complaint be marked for identification, your Honor, as a government exhibit.

(Marked Government's Exhibit 24 for identification.)

The Court: Mr. Starkey, please don't take this witness over this whole thing again.

Mr. Starkey: No, I won't, your Honor. I just want to offer the complaint first.

(Government's Exhibit 24 for identification received in evidence.)

Mr. Starkey: That is a copy; that is not the original, but all counsel are agreed that it is an accurate copy.

Redirect Examination by Mr. Starkey:

Q. Now, I believe it was Mr. Pogoda who asked you about being shown pictures of the defendants in this case, and being given their names at the time you were shown the pictures, Mr. Ellis. A. Yes.

—1089—

Q. Did you know the names of these individuals before you were shown the pictures? A. No, but the real names I didn't know. I knew the nicknames.

Q. You knew some names? A. Some names, yes.

Q. Now, Mr. Pogoda also asked you concerning the interviews in my office when you said that Jesse Colson was there, and you talked with Jesse about the facts of the case, and he refreshed your recollection and you refreshed his? A. Yes.

Q. Can you recall any of the things about which Jesse refreshed your recollection? A. It was about the last de-

livery of the kilo, and he told me that he had a jar, and I made him remember that I took the jar out of the car, and he told me to stand across the street in front of the Harlem Hospital and walk back, and he was up the block, and he wanted to see could he see Leon, and when he give me the signal to come across with the jar, I should, and when he gave me the signal I come across and gave him the jar, and he gave the jar to Leon.

Q. Did he refresh your recollection about anything else?

—1090—

A. I don't remember.

Q. Do you recall that you talked about the amount which was paid? A. Yes. I told him it was $14,000, and he told me it was twelve.

Q. Do you recall refreshing his recollection about anything? A. I don't remember.

Q. Do you recall any conversation about the 84th Street apartment? A. Yes.

Mr. Pogoda: This is the first time I hear 84th Street. Until now I have been hearing 94th Street from this witness.

Mr. Starkey: I think counsel opened the door on this question, your Honor. I asked the witness if he refreshed Colson's recollection about anything, and I now would like to put the question again.

Q. Do you recall—

Mr. Pogoda: My objection is, if the Court pleases, that this witness never said 84th Street. He has always used 94th Street.

Mr. Starkey now, for the first time, uses a different street.

—1091—

The Court: Is this a different place?

Mr. Starkey: Yes, your Honor.

The Court: Than you brought out on your direct? Is this a different place than was covered by your direct?

Mr. Starkey: Yes, your Honor.

Mr. Pogoda: Then I object to it, if the Court please, as improper redirect examination.

Mr. Starkey: This question relates to Mr. Pogoda's question as to "You refreshed his recollection and he refreshed yours" and I asked what it was that he refreshed "his recollection" about.

Mr. Carluccio: I object on the ground that it is completely leading and putting words into his mouth.

The Court: I sustain the objection. It is not really rebuttal. In other words, I am going to restrict you, on your rebuttal, and I am going to restrict any further recross. Let us proceed.

By Mr. Starkey:

Q. You testified that you always looked for Leon on 136th Street? A. Yes.

Q. Did you ever see him in any of the buildings on 136th Street?

Mr. Somers: I will object to that, your Honor.

—1091a—

None of that at all on direct. He met him in the street all the time. This is entirely new testimony he is attempting to elicit.

The Court: I will overrule that objection. I think he did testify with reference to other places.

Answer the question.

A. Yes. In this restaurant on 136th Street.

—1092—

Q. Whose restaurant? A. Leon's. I thought it was Leon's Restaurant.

Q. Do you recall Mr. Pogoda asking you whether Leon had given you $5000 on short acquaintanceship with you?

Mr. Carluccio: I move to strike that testimony about Leon's Restaurant. I think your Honor called to our attention that there was some testimony as to the building. I don't remember, up until now, any testimony as to Leon owning a restaurant, or having a restaurant. That is my recollection.

The Court: I will overrule the objection. It is already in, so let's proceed.

Q. Did you have any conversation with Leon about the $5000 and him not knowing you so well? A. He told me that he is not going to trust his money no more like this. He said he is going—he is trusting this time but nobody takes his money and leaves town because he can stay in this town and a few other towns, and he told me he trusts me with the money and any future deals are going to be, "Bring the coke, here is the money," and they are going to be like that.

Q. There was talk about tasting the cocaine on your

—1093—

cross-examination; do you recall that? A. Yes.

Q. How does it taste? A. It's got a bitterish taste.

Q. Mr. Pogoda asked you if you knew that Duke was Jesse's partner before the conversation with him when you got back from Chicago.

Leon Ellis—for Government—Redirect

Mr. Pogoda: If the Court please, I object to the form of the question. Each of these questions repeats my name. I don't think that form is a part of this case. The question should be asked without referring to any particular counsel.

The Court: I sustain the objection. Just ask the questions.

Q. How did you know, before that conversation with Duke when you returned from Chicago, that he was Jesse's partner? A. Jesse told me.

Q. You testified you were in protective custody? A. Yes.

Q. Whose decision was that? Whose choice was that?

Mr. Somers: I will object to that, your Honor.

—1094—

The Court: I sustain the objection. It doesn't matter. Let's proceed.

Q. Have you been free to go where you want and do what you want during that period? A. When I was under protective custody?

Q. Yes. A. Yes.

Mr. Somers: Your Honor, if I may state, the relevance of whose choice it is, your Honor, I think defense counsel cross-examined in that area tending to show or attempting to show that during this period he has been intimidated in some way by the Government, and I would ask the question on that basis, as to whose choice it was that he had this protection.

The Court: Well, I think it is irrelevant. He has

the protection. He can go where he wants to, and so on. Let's get on with something else.

Q. You also testified that Jesse Colson threatened you. A. Yes.

Q. When did this take place? A. I don't know exactly but about three or four weeks ago.

Q. What was it that he said at that time? A. I was

—1095—

sitting in the bar with a friend of mine, and he came in and said, "You were on the street talking about me. I should punch you in the mouth," or something like that.

And I told him, "Go ahead." I said, "Go ahead and kill me now," you know.

He said, "I am not going to kill you; I am going to let the syndicate take care of you."

And I told him to take a walk or do something.

And he came out and jumped in his car and speeded away.

Q. Did you ever have any conversation with him about your getting out of town? A. Yes.

Mr. Somers: I object to that as distinctly leading, your Honor. It is distinctly leading.

Mr. Starkey: I wouldn't know how else to ask it, your Honor.

Mr. Somers: That is distinctly leading. Counsel can ask him what other conversation he might have had, but not put it like that.

The Court: What other conversation did you have with Colson?

The Witness: He told me he thought it would be

—1096—

best for me to leave town.

And I told him, I said, "Yes, I may leave."

He said, "Because the people is looking for you every day and you got to go and hide."

And I told him, I said, "Yes, I ain't got no money."

And he told me that he was going to see Leon and see could he borrow some money for me to leave town.

And as I thought it over, I said, "I can't leave town." I said, "I got a case downtown in court."

Q. Did there come a time when you talked to him about it again? A. Yes.

Q. How much later? A. It was three or four days later he came by the house about 9 o'clock that night, and he told me that he was going to send his old lady over to bring Leon down to her house to see about borrowing some money.

Mr. Somers: I cannot hear this man with his hand in front of his mouth.

A. (Continuing) He came to my house and he told me that

he was going to send his old lady by the bar to get Leon and bring him by her house to see about borrowing some money for me to leave town.

I told him, "Okay."

He came back about 3.30 that morning, and he told me that Leon was down his house, you know, and he wanted me to get dressed, and after I got dressed he took me on down there.

I went upstairs, and Leon was there, and he said, "I hear you want to leave town."

I says, "Yes. I said that, but I can't leave town. I got kids, I got a case down in the court pending," and I said, "If I leave town I will be running for the rest of my life."

He says, "Yes, that's right."

So he gave me $50 and told me to just stay close, stay off the street, "Don't be on the street too much."

Q. Don't be on the street too much? A. Yes.

Q. Finally, after each of these deliveries, to Leon or to Mersh, did you ever have any conversation about the specific delivery after the delivery? A. No.

—1098—

Mr. Starkey: One moment, please, your Honor.

(A pause.)

Q. On the date you were brought into my office after your arrest, Mr. Ellis, do you recall hearing the date February 12 on that date, February 12, 1958? A. Yes, yes. I think so. I'm not sure.

Q. You are not sure whether you did or not? A. No, I am not sure.

Mr. Starkey: No further questions.

Mr. Somers: May I interrogate him now, your Honor?

The Court: Yes.

Recross Examination by Mr. Somers:

Q. Schoolboy, you say that this conversation where this girl—

Mr. Starkey: I am sorry. I hate to interrupt Mr. Somers but I did miss a page of my notes, or a half

page, your Honor, and I would ask the Court's leave to continue my redirect examination.

The Court: All right.

Mr. Somers: Certainly.

Redirect Examination by Mr. Starkey (Continued):

Q. Did you testify before the grand jury, Mr. Ellis? A.

—1099—

No.

Mr. Pogoda: May I at this time note for the record, if the Court pleases, that Mr. Starkey is well aware that this defendant, this witness was arrested after the indictment in this case had been found, and the question was intended, in my opinion, to inflame the jury against these defendants, that this witness was not a witness before the grand jury.

Mr. Starkey: Your Honor, the question is—

Mr. Pogoda: And I submit to the Court that this is unfair conduct on the part of a prosecutor of this court.

The Court: Wait just a minute, please. That is precisely the same question that you asked the witness.

Mr. Pogoda: No, that is not so, if the Court please. It was stipulated in the record now that the indictment was found in March. The witness, by everything, indicated that he was arrested in April, so that he could not have testified before the grand jury, and at this time I now move for a mistrial.

The Court: That is denied. Let's proceed.

Mr. Starkey: Your Honor, I would merely like to

—1100—

put on the record the reason for the question. Mr. Somers' questions about the description of John Doe Leon in the indictment—

The Court: Let's proceed.

Q. At the time of your arrest, or at any time thereafter, did any Government employee ever say anything to you about being the Leon in the indictment?

Mr. Somers: I will object to that, your Honor. Would you repeat that, please?

(Question read.)

Mr. Somers: I will withdraw the question.

A. They told me specifically that I wasn't the Leon.

Q. That you were not? A. That I was not the Leon.

Q. You were asked if you knew where Tillie was now; do you have any idea? Have you heard where Tillie is? A. No.

Q. Do you know whether or not Tillie and Mersh are friends of Leon's? A. I don't know. I thought they was kind of close.

—1101—

Mr. Starkey: No further questions.

Recross Examination by Mr. Somers:

Q. Mr. Ellis, you say that the Government specifically told you that you were not the Leon mentioned in this indictment. When did they tell you that? A. This was when I was arrested.

Q. Did they talk to you about this indictment at that time? A. No.

Q. Then what did you mean by telling us, in response to Mr. Starkey's question, that they told you specifically that you were not the Leon? Did anybody ask you whether you were the Leon? A: No. When I gave my name, I think Agent Murphy said, "We are going to have to call this case the Leon case because there are so many Leons in this case."

Q. That is all that was said? A. Yes.

Q. Nobody said, "You are not the Leon that is mentioned in the indictment"? A. No.

Q. Of course not. You were not even told there was an indictment; you were arrested on this charge of six ounces

in the February 12 situation? A. I was arrested for violating the Narcotic Act.

Q. Now, you just said a few minutes ago that a few weeks ago this conversation took place at a bar or at somebody's house—I am not sure. A. Jesse's girl friend's house.

Q. Jesse's girl friend's house? A. Yes.

Q. And that Leon and you talked about something, and he gave you 50; is that your memory? A. You want to know what we talked about?

Q. You talked about something; you had a conversation during the course of which you got $50? A. I was speaking about—

The Court: Just a minute. He gave you $50 at this time?

The Witness: Yes.

The Court: All right. Take the witness.

Q. When was this exactly? A. I don't know exactly. It was in February or March.

Q. Was that before you went down to Mr. Starkey's office? A. I didn't go to Mr. Starkey. I was arrested.

—1103—

Q. Well, you didn't volunteer to go to Mr. Starkey; is that what you are saying? A. No.

Q. You were arrested and brought to Mr. Starkey? A. I was arrested and brought to West Street.

Q. And since then did you see Leon, since that time? A. Since what time?

Q. Since the time you were arrested. A. I saw him once previous, yes.

Q. You saw him in the street? A. No.

Q. What's that? A. No.

Q. Well, I thought you said you did see him. Where did you see him? A. I saw him in the Purple Bar.

Q. I asked you about that earlier. Did he offer you any money then? A. We didn't talk then.

Q. You didn't talk? A. No.

Q. Now, Jesse and you had been in Starkey's office together repeatedly, isn't that true? A. No.

—1104—

Q. Haven't you told us several times that you and Jesse were in Mr. Starkey's office when you were questioned, or when Jesse was being questioned? Didn't you tell us that time and again? A. That was after I was arrested.

Q. Yes. I am speaking about after you were arrested. A. But you are telling me about something else before.

Q. No. At any time you and Jesse were in Mr. Starkey's office and Jesse was refreshing your recollection as to certain things, didn't you just testify to that? A. Yes.

Q. Jesse was out in the street, wasn't he? A. Yes.

Q. Did Jesse know that you had been talking to Mr. Starkey? A. No.

Q. Well, didn't you know? He was right there in the office. Why do you think you were there?

Mr. Starkey: I will ask that he fix a time.

Mr. Somers: I will.

—1105—

Q. The times you and Jesse were in Mr. Starkey's office —I am speaking of those—Jesse knew that you spoke to Starkey about these matters, didn't he? A. No.

Q. Well, didn't you say again and again that Jesse refreshed your recollection, and you said about taking the jars out, and who had brought them out, you were talking about the coke? A. This was me and Jesse. When Jesse was in Mr. Starkey's room I wasn't in there. Only a couple of occasions, and we wasn't saying anything.

Q. You mean you weren't saying anything when you and Jesse were together? A. Ask that again, please.

Q. Did you ever say anything to Mr. Starkey while Jesse was present? A. Yes.

Q. About this case? A. Not to Mr. Starkey. Me and Jesse was talking about it.

Q. Well, Jesse was talking about this case to Mr. Starkey, and you were present, is that it? A. Me and Jesse was talking about the case.

Q. You and Jesse were talking about the case? A. Yes.

—1106—

Q. So that Jesse at all times knew that you were telling Mr. Starkey all about these transactions? A. He didn't know anything.

The Court: When you and Jesse were talking about this case and he was refreshing your recollection, was Mr. Starkey present and listening to you talk?

The Witness: Yes.

The Court: All right.

Q. So Jesse knew that you were telling Mr. Starkey all about Jesse's transactions with various defendants? A. Yes.

Q. He knew that? A. At that time, yes.

Q. And was it after that time that Jesse threatened you? A. No. It was before.

Q. Before? A. Yes.

Q. Jesse told you to leave town before or after? A. Before.

Q. And Jesse said to you that you were going to be

—1107—

arrested? A. Yes.

Q. Jesse told you you were going to be arrested? A. Yes.

Q. You expected to be arrested? A. No.

Q. Except that Jesse told you you would be arrested? A. (No response.)

Q. Now, Jesse had been arrested at that time, hadn't he? A. Yes.

Q. And Jesse knew that he was being charged with a violation of the narcotics laws when he told you to leave town, is that right? A. I guess so.

Q. Did you ask Jesse, "Why don't you leave town"? A. No.

Q. Did you say that to Jesse? A. No.

Q. You didn't say that to Jesse? A. No.

Q. You knew Jesse had money? A. I didn't know he had money.

—1108—

Q. You didn't know he had money? A. No.

Q. But you didn't have money to leave town; is that what you are saying? A. Yes.

Q. And that is the reason you didn't leave town, because you didn't have money? A. Well, I wasn't—I don't think I would have left town anyway. I don't think so.

Q. And then later you say that you got $50 from Leon? A. Yes.

Q. Now, when you told Leon that you had a wife and children, and you didn't want to leave town, Leon didn't urge you and say, "Well, we will take care of your wife and children, leave town," did he? A. No.

Q. You said, "Yes, that's right," and he gave you $50? A. Yes.

Q. So that Leon at that time knew that Jesse had been arrested and that you expected to be arrested?

Mr. Starkey: I will object to what Leon knew, your Honor.

—1109—

The Court: Did you know whether Leon knew you would be arrested? Was there any way that you would know this?

The Witness: I don't know, sir.

Q. Let me ask you: Did it occur to you that Leon might think that you wanted to leave town because of something else?

Mr. Starkey: I will object to that, your Honor.

The Court: I will sustain the objection. You are trying to probe his mind now and you better ask him another question.

Q. Now listen to me, Schoolboy, you had been talking about leaving town. Jesse said, "I will get Leon down here so you can get some money because you said you didn't have money." Am I correct there? A. No, you are wrong. You are saying it wrong.

Q. Well, you say it right. A. Jesse told me that I better leave town because they are liable to pick me up any minute.

Q. For what reason? A. For violating the Narcotic Act.

Q. With Jesse? A. With everybody.

—1110—

Q. With everybody? A. Yes.

Q. Yes. Including Leon Aiken? A. Including everybody that I deal with.

Q. Jesse had been arrested by this time? A. Yes, sure.

Q. And you knew this proceeding was pending at this time? You knew this proceeding was pending against Jesse certainly? A. Against Jesse?

Q. Against Jesse, yes. Jesse had been arrested? A. Yes.

Q. Did you know whether Leon Aiken had been arrested at this time? A. I didn't know.

Q. You didn't know one way or the other? A. No.

Q. And then you say you didn't want to leave town because you didn't have the money to take care of your needs, is that about it? A. (No response.)

Q. Did you say that? A. I said that I wasn't going to leave town because I had a case down in court pending

—1111—

against me, and I had kids here, and if I leave town I will be running the rest of my life, and that's the reason I wasn't going to leave town.

Q. So that you weren't going to leave town under any circumstances? A. No.

Q. But yet you permitted Jesse to arrange a meet with Leon at Jesse's girl friend's house, am I right? A. Yes.

Q. Why did you do that if you weren't going to leave town anyway? A. I permitted Jesse to make arrangements?

Q. Yes. Didn't you say that? A. Jesse came by my house and told me that he was going to send this old lady over to the bar and bring Leon down to his girl friend's house that night.

Q. For what purpose? A. For what purpose?

Q. Yes. A. To give me some money to leave town.

Q. But you had said you wouldn't leave town under any circumstances. A. In other words, I didn't tell him that.

—1112—

Q. You didn't tell that to Jesse? A. No.

Q. Oh, you didn't tell that to Jesse. A. No.

Q. You led Jesse to believe that you would listen to any proposition that might give you some money? A. Yes, sure.

Q. Sure? A. Yes.

Q. Sure, sure. But you had no intention of taking the money and leaving town; you just wanted to get the money, is that correct? A. No, I wasn't going to accept the money under no circumstances.

Q. You weren't going to accept the money under no

circumstances. Okay. But you did accept $50, didn't you? A. Yes.

Q. You didn't return that to Aiken, did you? A. I didn't return what?

Q. You didn't return the $50 to Aiken, did you? A. No.

Q. You took the money? A. Yes.

—1113—

Q. What was the conversation, did you say, when Aiken and you and Jesse met at Jesse's girl friend's house? A. He asked me that he heard I wanted to leave town.

I said, "Yes, me and Jesse was talking about that but I said I can't leave town. I got a case pending against me downtown, and if I leave town now I will be running for the rest of my life."

Q. Was there any discussion about what you were leaving for or running from? A. I think it was understood what I was running from.

Q. That you were running from this narcotic conspiracy indictment, isn't that right? Isn't that what was understood? A. I just got through telling you I have a case over in the court and—

Q. Do you think it was Jesse's concern, and did you think at this time that it was Jesse's concern or Aiken's concern about this numbers case in General Sessions?

Mr. Starkey: No objection.

—1114—

Q. Did you think they were concerned about that?

Mr. Starkey: Objection.

The Court: I think it would be easier for him to answer it. They were not concerned about your numbers case, were they?

The Witness: No, sir.

Q. So they were concerned about the narcotics conspiracy, is that right? A. I don't know.

Q. You don't know? A. I don't know.

Q. And Aiken was concerned about his possible involvement in that narcotic conspiracy, right? A. I don't know.

Q. You don't know? A. (No response.)

Q. But Aiken was just going to give you money just like that to leave town? A. I don't know.

Q. You don't know? A. (No response.)

Mr. Somers: That's it.

The Court: We will recess now, with the same instructions, until 2.15 p.m.

—1115—

Mr. Pogoda: I did want to make a point, if the Court pleases, that I have been directed to appear before a judge in Brooklyn during my luncheon recess, and I wondered if your Honor wouldn't extend it another five or ten minutes. I will forego lunch and take a taxi back and forth.

The Court: All right, sir.

We will make it 2.25. Would that be sufficient?

Mr. Pogoda: Thank you, your Honor.

The Court: 2.25 p.m. with the same instructions.

(Recess to 2.25 p.m.)

—1116—

AFTERNOON SESSION

(Jury in box.)

LEON ELLIS resumed.

Recross Examination by Mr. Carluccio:

Q. Mr. Ellis, do you mind if I call you Leon? A. No.

Q. Leon, you say that Jesse threatened you three or four weeks ago? A. Yes.

Q. And you were afraid of Jesse at that time? A. No.

Q. You stated that you were afraid of getting into a great deal of trouble.

Mr. Starkey: Your Honor, I object. I don't think this is proper recross examination at this time.

The Court: I think he has testified that he was afraid of getting into a lot of trouble, so let's get on.

Q. You maintain that you were not afraid of Jesse?

Mr. Starkey: Objection.

The Court: I don't believe that Mr. Starkey went into that on his redirect, did he?

Mr. Carluccio: Yes, he did, your Honor. He said

—1117—

that Jesse threatened him three or four times. "I ought to punch you in the mouth but I will let the syndicate take care of you."

The Court: All right, go ahead.

Read the question.

(Question read.)

The Court: He has answered that several times. He said no, he was not afraid of Jesse, and he isn't afraid of Jesse, as I understand his testimony.

Q. Do you know where Jesse is today?

Mr. Starkey: Objection.

The Court: Well, I assume he knows but I don't think it concerns us.

Mr. Starkey: I withdraw the objection.

The Court: Do you know?

The Witness: Yes.

Q. Leon, there was a question asked about whether or not you were the Leon in the indictment, and the first time I heard your answer, the answer from you, it sounded like you were the Leon named in the indictment, and then Mr. Starkey said "were not," and you said, "I was not the Leon in the indictment."

Did I recall that correctly? A. I don't know.

—1118—

Q. You don't remember? A. Not exactly.

Q. Well, do you have trouble speaking sometimes?

Mr. Starkey: Objection.

A. No.

The Court: He answered the question. He said no.

Q. You don't have trouble speaking sometimes, do you? A. No.

Q. You don't have any speech impediment? A. I don't think so.

Q. Did you ever have a speech impediment?

Mr. Starkey: Objection.

The Court: You never did, did you?

The Witness: No, sir.

The Court: All right, let's proceed.

Q. If you are not afraid of Jesse, as you state, are you afraid of what the Government might do to you?

Mr. Starkey: Objection.

Mr. Carluccio: I have a right to ask that question.

Mr. Starkey: It is not proper recross examination, your Honor.

—1119—

The Court: I think we have been into it many times.

Mr. Carluccio: It is my last question.

The Court: Can you answer that?

The Witness: Yes.

The Court: Answer it.

A. Jesse told me—I am not afraid of Jesse—that after this he had been threatened, his wife was—

The Court: Wait just a minute, please. That wasn't the question. Read the question.

(Question read.)

A. No.

Mr. Pogoda: Just one question.

Recross Examination by Mr. Pogoda:

Q. Mr. Ellis, after you left court yesterday were you in the custody of the United States Customs agent? A. Yes.

Q. Which agent? A. I don't know exactly what his name is. I can't remember his name now.

Q. When you left court here did you go directly out of the building or did you go to Mr. Starkey's office? A. I

—1120—

went to Mr. Starkey's office.

Q. How long did you spend in Mr. Starkey's office? A. Until the agent came over and picked me up.

Q. How long would that be? A. I don't know exactly.

Q. One hour or more? A. I don't know exactly.

Q. Well, while you were in Mr. Starkey's office did you talk to Mr. Starkey? A. Yes.

Q. Did you discuss your testimony with him? A. No.

Q. Did any agent discuss your testimony here in court? A. No.

Q. So that from the time you left the court yesterday until you returned this morning you had no conversations with anyone connected with the Government about your testimony in this case? A. Mr. Starkey asked me a few questions, yes.

Q. What questions did he ask you? A. He asked me when was the last time that me and Colson and Leon was present.

—1121—

Q. What did you tell him? A. I told him that me and Leon and Jesse was present down at his girl friend's house, Jesse's girl friend's house.

Q. What was the second question he asked you? A. "When was the time that Jesse threatened you?"

Q. Those are the only two questions? A. He asked me what was the first time that I saw Leon's picture.

Q. What did you say to him? A. I told him, yes, I remember the first time, but I don't know exactly what date it was.

Q. It was only two weeks ago, wasn't it? A. I don't remember.

Q. Do you recall that it was on June 6 at the time the girl stenographer was in Mr. Starkey's office? A. I don't remember.

Q. You had been over this story time and time again with Mr. Starkey, isn't that so? A. No.

Q. Did you ever discuss with Mr. Starkey that Jesse threatened you? A. I don't think so. I think I told Agent Barry that.

—1122—

Q. Agent who? A. Barry. Mr. Murphy.

Q. Now, when you came to court this morning did you review your testimony with either Mr. Starkey or any other agent for the Government? A. No.

Q. During the lunch hour did you discuss anything? A. No.

Q. So that the last time you discussed your testimony with anyone connected with the Government was after you left court yesterday afternoon? A. No.

Q. Is it yes or no? A. No.

Q. Well, I don't understand the answer. A. Mr. Starkey was asking me when the last time that me and Jesse and Leon was in conversation, and I don't think that was discussed. He asked me a question and I answered him.

Q. Since then nothing was said by you or by Mr. Starkey to each other, or any agent connected with this case about your testimony? A. Mr. Starkey asked me the first time that I saw Leon's picture.

Q. Yes. Well, that was yesterday, I mean since yester-

—1123—

day you did not discuss the case today? A. No.

Q. Or last night? A. No.

Mr. Pogoda: That's all.

Mr. Somers: One question.

The Court: All right.

Recross Examination by Mr. Somers:

Q. Leon, you said that for the last 15 or 16 days you been in protective custody? A. Yes.

Q. And you also had an agent with you in the last 15 or 16 days? A. Yes, or close by.

Q. A federal agent? A. Yes.

Q. And that was shortly before this trial commenced, is that right? A. Well, it's about—

Q. This trial commenced last Tuesday. A. It's about 10 or 15 days.

Q. And you are in protective custody right now, I take it? A. Yes.

—1124—

Q. Now, you said that Mr. Starkey, for the first time, last night asked you when you and Jesse and Leon had been together the last time, or had spoken the last time, or did he say—forgive me—"When was the last time you and Jesse and Leon spoke together?" Is that what he

asked you last night? A. He asked me when was the last meeting that Leon and Jesse and me had.

Q. And you told him then for the first time about this meeting of the $50 situation that you told the jury about this morning? A. The last time?

Q. Yes. A. No, I don't think it was the first time. I think I told him before.

Q. You did tell him before? A. Yes.

Q. You told him about this business of Leon offering you some money, and you accepting it, $50? You told this to Mr. Starkey before last night; is that what I understand you to say? A. I didn't say that he offered me some money. I said he gave me $50.

Q. And you told that to Mr. Starkey during this eight

—1125—

or ten meeting period that you had between the 25th of April and the 6th of June of this year; is that right? A. I don't remember telling it to him because he asked me the last meeting that me and Jesse had, and I think Jesse Colson told him also.

Q. Jesse Colson also told him about the discussion about your leaving town and your refusal to leave town? A. No. I told him.

Q. You told that to Mr. Starkey? A. Yes.

Q. And you told us about it for the first time here in court, is that right, today? A. That was the first time I was asked about it.

Mr. Somers: That is all. Thank you very much.

The Court: Are we finished with the witness?

Mr. Starkey: No, your Honor. I have one small matter that I would like to cover.

Leon Ellis—for Government—Redirect
Finbarr J. Murphy—for Government—Direct

Redirect Examination by Mr. Starkey:

Q. Now, on recross, Mr. Ellis, you were asked whether or not this date, this June 6th date, when this statement was taken, was the first time you saw Leon's picture? A.

—1126—

No, I was not.

Q. Do you recall how long before that you had seen it? A. I don't know. Three weeks before then.

Mr. Starkey: No further questions.
The Court: Do you have any more questions?
Mr. Pogoda: No questions.
The Court: Step down, please.

(Witness excused.)

—1382—

New York, June 26, 1961,
10:30 o'clock a.m.

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—1385—

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FINBARR J. MURPHY, called as a witness on behalf of the government, being first duly sworn, testified as follows:

Direct Examination by Mr. Starkey:

Q. What is your occupation, sir? A. I am a customs agent with the Treasury Department, Bureau of Customs.

Q. How long have you been so employed? A. Approximately four years.

Q. Are you the agent in charge of the investigation of this case? A. I am.

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—1427—

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Direct Examination by Mr. Starkey (Continued):

Q. Now, Agent Murphy, do you know Leon Ellis? A. Leon Ellis?

Q. Schoolboy. A. Yes, sir.

Q. Was it you who placed him under arrest on March 26, 1961? In April? A. Actually, he was placed under arrest by a Customs enforcement officer. I was nearby.

—1428—

Q. And were you in the courtroom when Schoolboy testified? A. I was.

Q. Do you recall questions being addressed to him as to whether or not he was told he was indicted in this case or not? A. I remember.

Q. Did you ever have such a conversation with him?

Mr. Somers: I will object to that. I think that Mr. Starkey is apparently going to impeach the testimony of his prior witness.

Mr. Starkey: Not at all, your Honor. Schoolboy testified that he could not remember.

Mr. Somers: Schoolboy here testified at great length to two days—

The Court: That is overruled.

Answer the question.

Q. Did you ever have a conversation with him as to whether or not he was named in this indictment? A. I did.

Q. When? A. Coming down the West Side Highway, after he was placed under arrest.

Q. And that was the end of April? A. Yes.

—1429—

Q. What did you say? A. I told him that he wasn't named in the indictment.

Mr. Somers: He was not named?

The Witness: Not a defendant in the indictment.

Mr. Somers: I am sorry.

A. (Continuing) He was not a defendant in this case.

Q. Do you know a man by the name of Leon Aiken? A. I do.

Q. Or Leonard Aiken, I should say. A. I do.

Q. Was it you who placed him under arrest? A. Yes. I executed a warrant on December 13th.

Q. On what? A. Not December. May 13, 1961.

Mr. Starkey: I ask that this document be marked as a government's exhibit for identification.

(Marked Government's Exhibit 33 for identification.)

Q. I show you Government's Exhibit 33 for identification and ask you if that is the warrant which you executed in taking Aiken into custody? A. Yes; it is.

—1430—

Mr. Starkey: I offer in evidence Government's Exhibit 33 for identification.

Q. Did there come a time thereafter when you saw the defendant Aiken and myself together? A. Yes, sir.

Q. Where was that? A. It was in your office in this building.

Q. Did you hear any conversation at that time? A. Yes; I did.

Q. Did you hear any conversation as to his identity, or concerning his identity? A. Yes.

Q. What did I say and what did he say? A. First you asked him his name. He gave you Leonard Royall Aiken. You asked him, "Are you known by any other names?" He said, "Yes. I am known as Leon."

Q. Was there any conversation that you recall about Schoolboy? A. Yes. You asked the defendant Aiken if he knew a Schoolboy, to which defendant Aiken stated that he knew a fellow by the name of Schoolboy, he knows him two or three years.

—1431—

(Government's Exhibit 33 for identification received in evidence.)

Q. Were you present at the arraignment of the defendant Aiken? A. Yes.

Q. What happened thereafter? A. After his arraignment?

Q. Yes. A. I brought defendant Aiken down to the U.S. marshal's office, approximately 1:30 or 2 o'clock. There were no marshals available to take him to West Street for safekeeping, so I brought him over, and I pulled up in front of the Federal House of Detention, and I turned to tell the defendant Aiken to get out, I was going to place him in the house, at which time I noticed the defendant Aiken was sweating profusely and had a nervous twitch on the side of his face.

Mr. Somers: I object to the characterization "nervous twitch", your Honor.

The Court: Suppose you describe what was said, leaving out the word "nervous." Describe how he looked.

A. (Continuing) The left side of his face was moving back and forth and jumping. I told him to get out, and defendant Aiken said, "Wait a minute."

—1432—

And I said, "Why?"

He says, "If you ever get any stuff"—

Mr. Somers: Your Honor, I object to that. This is a conversation in no way relevant to the eighth count of the indictment, which charges this defendant with conspiracy, and unless Mr. Starkey is going to limit this to such conversation or such declaration by the defendant Aiken as may be construed in furtherance of the conspiracy, I submit it is highly improper, highly prejudicial. The conspiracy was terminated back in 1958 in the fall. This is a conversation held in March of 1961.

Mr. Starkey: May.

Mr. Somers: May, 1961, long after the termination of the conspiracy. If this defendant were charged individually with a substantive count, I might recognize the value of that and the admissibility of it, but I submit, your Honor, to allow this conversation into the record is highly prejudicial, in no way in furtherance of the conspiracy and absolutely inadmissible.

Mr. Starkey: The government, of course,—

The Court: I think the government has filed a memorandum covering this particular evidence, and

the Court has had an opportunity to study the memo-

—1433—

randum and also the authorities, and it is the Court's view that the evidence is admissible only as to the defendant Aiken, and the jury is instructed that what the witness will testify to now is admissible only as to the defendant Aiken and not as to any other defendants on trial, and is in no way to give rise to any inference whatever as to any other defendants on trial, other, of course, than the defendant Aiken.

Mr. Somers: Your Honor, do you feel that this is under the eighth count of the indictment in furtherance of the conspiracy? On what ground, may I respectfully ask, has your Honor decided that it is admissible?

The Court: Well, sir, I don't want to give it to you in front of the jury, but I am in accord with the cases which the government cited in its memorandum and the principles which are outlined in those cases, not that it is connected with the conspiracy at all.

Mr. Somers: I see. It is not on that ground?

The Court: No. Nor does it refer to the conspiracy, nor does it relate to the conspiracy, but it is on the basis of the cases in the memorandum.

Mr. Somers: Thank you, Judge.

Mr. Carluccio: With all due deference to your Honor's ruling, for the record, I respectfully object

—1434—

on the ground that even though your Honor has cautiously instructed the jury, I feel that the strong and highly prejudicial sounds of those words will drown out all weaker sounds, and the probative

value that might be adduced with reference to the point that Mr. Starkey makes will not blot out the words in the jury's minds, and the jury will not be able to make this very fine distinction, and my client will be therefore prejudiced.

The Court: Let the objection be recorded, and it is overruled.

Proceed.

By Mr. Starkey:

Q. Will you proceed, Agent Murphy, with the conversation you were describing? A. Yes. The defendant Aiken stated to me that, "If you get any stuff you want to get rid of, call me."

And I said, "What?"

He said, "If you get any stuff you want to get rid of, call me. You can trust me."

I said to him, "I can trust you? Do you know who I am?"

He said, "Yes."

I said, "Well, as of last night I never even met you."

—1435—

He says, "Don't worry. You can trust me."

I said, "I don't work like that. If I am going to work with you, I've got to know who you are doing business with."

He said, "What do you mean?"

I said, "Well, I have a lot to lose here."

So I told him, "I've got to have references. Give me some people that I can check up." I said, "I got to have references of people that have done business with you before, before I go into anything with you."

And this conversation terminated, and I took him into the Federal House.

Finbarr J. Murphy—for Government—Cross

Q. Now, Agent Murphy, are you familiar with the vernacular and slang used in the New York area insofar as a reference to narcotics is concerned? A. I am.

Q. Do you know any of the words which are used among narcotic traffickers to designate narcotics? A. I do.

Q. Will you tell the Court and jury what such words are? A. Cocaine is "white stuff." They call it "C". "H" is "horse", heroin. "Reefer" is marihuana, "pot", "M".

Mr. Starkey: No further questions.

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—1450—

Cross Examination by Mr. Pogoda:

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—1472—

Q. Now, Agent Murphy, when for the first time did the name of the defendant Leon Aiken come to your attention? A. That came to my attention maybe May 9—the name of Leon Aiken, Leonard Aiken?

—1473—

Q. 1961? A. Yes.

Q. Had his name been mentioned at any time prior to May 9, 1961? A. His proper name?

Q. The name Leon? A. Oh, yes.

Q. By whom? A. By Jesse Colson. The name Leon, right.

Q. When did his name come up? When was that conversation? A. July '59.

Q. You were not interested at that time in the sale of narcotics. You were merely interested in the smuggling, the importation of narcotics; is not that true? A. The sale of narcotics always interests me, but we have a jurisdictional agreement between Bureau of Narcotics and our-

selves. We will handle the smuggling across the borders. They will handle inside the cities.

Q. Didn't you tell me, in response to the question about Leon Ellis, that your concern and your investigation in this

—1474—

case only concerned itself with the smuggling and nothing else?

Mr. Starkey: Objection, your Honor. He said, "primarily interested in the smuggling." I will object to counsel paraphrasing the testimony.

The Court: I think he said "primarily." I assume you will accept that.

Q. Did you get a description of Leon, the John Doe in the indictment, from the defendant Colson? A. Yes.

Q. That was in 1959? A. 1959, right.

Q. Now, tell the Court and jury what you did in apprehending Leon between July, 1959 and May 9, in 1961. A. Well, I made inquiries of seamen. I made inquiries of informants I have. My work took me up to the Harlem squads, the precinct squads. I made inquiry there. I was only supplied with a name, had no picture, had no last name.

Q. Jesse Colson was cooperating with you, wasn't he, in July or August of 1959? A. Yes; he was.

Q. Did you ever take Jesse Colson to the area in which he said he was doing business with Leon Aiken? A. No. I told Jesse to keep an eye out for Leon. I had no tangible

—1475—

evidence as to who he was. And if he did turn him up, to let me know.

Q. You did set up the defendants Massiah and Anfield for a meeting between the two, between Colson and him;

is that not true? A. With the cooperation of Jesse, yes.

Q. That is right. Did you ask Jesse to cooperate with you to locate the defendant Leon, that you were looking for? A. Oh, yes.

Q. And Jesse did not? A. He did not, no.

Q. In speaking with Jesse Colson, didn't you ascertain the locality or the neighborhood that he supposedly did business with him? A. He was a man about town, I was told. He had no particular locality. 135th Street, 145th Street.

Q. In your talks and conversations with Jesse Colson, didn't you ascertain if Leon was always around 136th Street?

Mr. Starkey: One moment, your Honor.
Did you say Leon Ellis?
Mr. Pogoda: The defendant Leon, Aiken.
The Witness: He said Ellis.

—1476—

Q. The defendant Leon. A. Will you please refer to Aiken?

Q. All right. In your conversations with Jesse Colson, wasn't it a fact or is it a fact that Jesse Colson told you that Leon Aiken could be found on 136th Street? A. He told me the areas where Leon, last name unknown at the time, frequented. I told him, "If you should see him, let me know."

Q. Didn't he tell you the defendant Leon Aiken operated a restaurant known as Leon's at 136th Street and Lenox Avenue? A. No; he did not.

Q. Who told you that? A. A private source of information.

Q. Was that in May of 1961, this private source of information gave you that? A. Yes. I believe so, yes.

Q. So that you all looked for the defendant Aiken for a period of almost two years before he was apprehended? A. I didn't hear that question.

Q. You searched for the defendant Aiken for a period of almost two years before he was apprehended?

Mr. Starkey: I will object to the question, your

—1477—

Honor. The witness' testimony speaks for itself in that regard.

The Court: Overruled.

Answer the question.

Mr. Pogoda: Are we going to recess now?

The Court: I thought maybe you wanted him to answer the question.

Mr. Pogoda: Well, that question is—

The Court: All right. The question is withdrawn.

We will recess now until 2.20, under the same instructions as before.

(Recess to 2.20 o'clock p.m.)

—1478—

AFTERNOON SESSION—2.20 P.M.

(Jury present.)

FINBARR J. MURPHY resumed.

The Court: The Court will make Court Exhibit 19 available to counsel for the defense.

All right. Let us proceed. Do you want to begin again, Mr. Pogoda?

Cross Examination by Mr. Pogoda (Continued):

Q. Now, Agent Murphy, I believe at the recess we were speaking about Leon Aiken. You knew of him in July or August of 1959, when he was arrested, and he was arrested in May of 1961. A. That was as Leon that I knew him.

Q. Did you ask Jesse Colson ever to accompany you in the area where he did business with Leon Aiken? A. No.

Q. Did you ask him to set up a meeting with the defendant Leon Aiken, as you had with the defendants Anfield and Massiah? A. Oh, yes. I told him if he saw him to let me know so that I could do something about it.

Q. Did you ever suggest or direct him to go in the area where he had done business with the defendant Aiken, to try to meet with him? A. Definitely, yes.

—1479—

Q. And did he report back to you that Leon Aiken was no longer in that area? A. I don't know whether he said

he was no longer in the area. I asked him periodically, "What about Leon?" And he said, "Well, I haven't seen him around."

Q. Did you search any federal records and show Jesse Colson photographs of people named Leon? A. I believe I inquired of the Federal Bureau of Narcotics.

Q. Doesn't the FBI have a record of everyone who has been arrested? A. Yes.

Mr. Starkey: Your Honor, I don't know whether—

Mr. Pogoda: I am coming down to it.

Mr. Starkey: I just want to state, your Honor, I don't know whether counsel is attempting to prejudice a defendant here or what, but I think this line of questioning is improper and—

The Court: Apparently he is in consultation with the defendant Aiken's lawyer, and I believe that it is with his approval. Otherwise we would have an objection from that source.

Q. Didn't you tell us before that you identified the defen-

—1480—

dant Anfield by a picture? A. Yes.

Q. Where did you get his picture? A. I got his picture from the Coast Guard.

Q. Does he have a criminal record? A. No; he does not.

Q. So that the only efforts you made to arrest the defendant Aiken were telling Jesse Colson to set up an appointment with him? A. I told him if he seen him, to let me know. If he seen him in a car, get a license plate number, get him in the area. And that's the way it stood.

Q. Did you ever offer to give him narcotics so as to approach the defendant Leon Aiken for the purpose of making

a deal with him? A. Did I ever offer to give him narcotics?

Q. Or pretend that you were giving him a package of narcotics for the purpose of setting him up for an arrest? A. No. I never did.

* * * * *

—1497—

Q. Do you have anything among your notes to describe the defendant John Doe, also known as Leon? A. Not in my notes. I believe that was given to Mr. Starkey by Jesse Colson.

Q. As best as you can recall, will you give us the description given to you by Jesse Colson of the John Doe mentioned in the indictment. A. Leon, last name unknown, male Negro, approximately five foot nine, five foot ten, 155, 160 pounds, chunky build. Colson told me that he had a discoloration on both sides of his cheeks here. The cheeks appeared darker in color than his forehead and the rest of his face.

That is the best of my recollection.

Q. That is the description given to you by Jesse Colson in August or July of 1959? A. That's correct.

—1498—

Q. Were you the one who arrested the defendant Leon Aiken? A. Yes.

Q. Was the arrest made by a New York City detective? A. Yes. That Friday evening, on the way home I stopped in at the 32nd Squad, and I spoke to a Detective Buchholt, and I showed him the picture of the defendant Aiken, and I showed him the warrant. I believe he noted down the warrant number. And I told him if he should come upon him to give me a call.

I was in Poughkeepsie at the time, visiting, and he called me about 3 a.m. in the morning, and he says, "I have him here." I naturally came right down, and I believe Detective Buchholt had him under arrest at the time based on a warrant, and when he turned him over to me I executed the warrant.

Q. And you have already related the conversation that you say took place between the defendant and you? A. Yes.

Q. You say he was the one who started the conversation with you? A. Yes.

Q. About buying stuff that you might get for him? A.

—1499—

Well, naturally I didn't start it. He started it.

Q. At that time he had already been booked, arrested? A. He was arraigned.

Q. He was already held on bail? A. That's correct.

Q. How much bail? A. Twenty thousand.

Q. And you say under these circumstances he started a conversation with you offering to do business with you in the narcotics trade? A. Among other things said, that is what he said to me.

Q. Did you ask him with whom he did business? A. I asked him for references as to whom he did business, that I could check him out.

Q. And he said he had no names to give you; isn't that so? A. No. He said he doesn't work that way. "You do business with me, and no one else knows what goes on."

Q. You did not proposition him to let him go if he would supply you with names? A. No; never.

—1500—

Q. You made no offer to give him any consideration if

he cooperated with you, did you? A. I can make no offers to anybody about receiving consideration.

Q. Well, the fact is that after Torres spoke with you, he was not arrested, was he? A. No; he was not.

Q. As far as you know, after the defendant, or after Schoolboy Ellis spoke to you, he was released in his own recognizance; isn't that so? A. Leon Ellis—I believe he was; yes, sir.

Q. And after Paul King came here from Seattle, Washington, and spoke with you and Mr. Starkey, there were no charges pressed against him, were there? A. I believe he was under arrest—actually no moving forward was brought against him.

Q. As far as the defendant Leon Aiken is concerned, he offered to do business with you, and you refused unless he gave you names for reference? A. In the conversation, naturally, when he came out with it, I am trying to squeeze him to come across, and I just went right along with him, and when he said, "Well, I won't give you any reference. When I do business with people, that's it"—I said, "Well, that is the way I work." That's it.

—1501—

Q. This was at a time when he was about to enter the federal House of Detention on West Street? A. Yes. I had just pulled up in front of the building.

Mr. Pogoda: I have no further questions.

The Court: All right, sir.

Mr. Somers: Your Honor, if we may, Mr. Carluccio apparently is still digesting some of this, so may I, so as to save the Court's time, propound a few questions and then reserve my rights until after

Mr. Carluccio is finished?

The Court: All right, sir.

Cross Examination by Mr. Somers:

Q. In 1951 you joined the New York City Police Force; right? A. In 1951, right.

Q. And you became a detective? A. Yes.

Q. When? A. In June of 1953.

Q. And you were a detective attached to the Narcotics Bureau for how long? A. No. I was not attached to the Narcotics Bureau.

—1502—

Q. Were you ever attached to the Narcotics Bureau? A. No; I was not. I was in the 46th Detective Squad at Ryder Avenue.

Q. So that you had very little traffic with narcotics as a police detective? A. Yes, you could say that. I knew about it, but that is a specialty with them.

Q. From your own experience with what you knew about narcotics and narcotics dealers, would you say that they were a rather cagey lot?

Mr. Starkey: Your Honor, I will object to this.

Mr. Somers: I think he understands me.

Mr. Starkey: Nevertheless, I object to asking the witness for a generality of that kind. There are dealers and there are dealers.

The Court: I am sure that the witness will agree that they are a cagey lot.

A. Well, they are cagey until they are caught.

Q. They are cagey until they are caught? A. Yes.

Q. But they don't go out in the street wearing signs that they are dealing in narcotics, of course, do they? A. No;

—1503—

they don't.

Q. Did you gain any impression at all, in your first meeting with Aiken, about whether or not he was a narcotics peddler? A. First impression?

Q. Yes. A. No.

Q. Now when did you first feel that this man indeed was a narcotics peddler? A. When did I first feel—

Q. Yes. At what time in your talk with him or acquaintance with him, or contact with him did you come to feel that you had a real narcotics peddler?

Mr. Starkey: I will object at this point, your Honor, because it assumes a fact not in evidence, and that is that Agent Murphy began to feel this way only after first meeting Aiken.

The Court: I think we ought to clarify this.

When you first came in contact with the defendant Aiken, what was the nature of that contact? Was it in connection with your work on this case?

The Witness: Yes, when I placed him under arrest.

Q. That would be in May of this year, May 13, I think

—1504—

it was, wasn't it? A. That's right.

Q. Of this year? A. Yes.

Q. Did you think after your initial meeting with him at 3 o'clock in the morning that he indeed was a narcotics peddler? A. From what I have known about him, yes.

Q. That is, you had formed a conclusion because of what

you had heard from Jesse and Schoolboy, I take it? A. No. I had other evidence of that fact.

Q. You had other feelings about it. So that you knew—you were reasonably convinced that this man was indeed a narcotics peddler? A. Yes; I was.

Q. You were? A. Yes.

Q. Did it strike you as strange that this man, who you felt was a narcotics peddler, should, on his first meeting with you—am I correct that you testified you had never seen him before? A. Never seen him before, right.

Q. You had never, in the course of your official duties, either as a Customs man or as a police man or a detective,

—1505—

run across the man before? A. Never have.

Q. This was the first time you had ever met him? A. The first time.

Q. Did it strike you as peculiar that he would approach you and ask you if you were willing to dispose of narcotics by way of him? Did that strike you as a little unusual in a narcotics peddler? A. You could have hit me with a brick.

Q. Yes. It was very unusual, wasn't it? A. That's right.

Q. That is not the sort of thing you would expect to hear? A. I almost fell out of the car when I heard it.

Q. You said something about Aiken, and you were talking—rather, Colson and you were talking about picking up Aiken after Jesse had told you about this man Leon? Leon was the name you gave; isn't that right? A. That's right.

Q. So you didn't tell Jesse, "Go around and see if you can pick up Aiken", did you? A. I didn't know what his last name was.

Q. Of course not. You knew of a man called Leon. A. Exactly.

Q. And you knew the man Leon to be not 155 to 160

—1506—

pounds but 145 pounds; isn't that right? A. You are speaking about the description?

Q. Leon. The description of Leon. Did you know how much he weighed? A. From Jesse?

Q. Yes. A. I figured about 155, as I remember it.

Q. As you remember it? A. Yes.

Q. And about how old he was? A. Approximately—well, when he gave me approximately 40, 45, the way he gave it to me.

Q. About how tall did you say he was? A. About five nine and a half, five ten.

Q. Five nine in the indictment, if you recall it. You have seen this indictment? A. I have seen it once, I believe.

Q. Look at it again for a minute, and it may refresh your recollection. How tall was he supposed to be? A. You are asking me about the first time Jesse Colson gave me the description of Leon?

Q. Well, now, look: Do I understand you correctly, Mr. Murphy, that you got certain information from Jesse about

—1507—

a man called Leon in the course of your talks with Jesse after he was arrested; is that correct? A. Yes.

Q. And Jesse didn't know Leon's last name; is that correct? A. That's correct.

Q. So he said, the man with whom he had done business was a fellow by the name of Leon, and he described him; is that correct? A. Yes.

Q. And how tall did he say he was? A. I would say about five nine and a half, as I remember it.

Q. Five nine and a half, now? A. Yes.

Q. When Mr. Pogoda spoke to you it was five nine or five ten—

Mr. Starkey: Your Honor, I submit counsel is now arguing with the witness and summing up at the same time.

The Court: Sustained.

Mr. Somers: Will you stand up and come over to the witness, please, Mr. Aiken.

Q. When you saw Aiken, did you notice the grey in his

—1508—

hair, in his temples? A. When I saw him?

Q. Yes. When you arrested him. A. I had his picture. That is the man.

Q. Look. You saw him. You looked at him, didn't you, Mr. Murphy?

Mr. Starkey: I will object to counsel shouting at the witness, also.

Q. (Continuing) I don't want to shout at you. You are a trained police officer. Did you notice the grey in his temples? A. Yes.

Q. Did you notice his weight? A. Stocky, yes.

Q. Would you say that that man is 165 pounds?

Mr. Starkey: Your Honor, again I will object on the ground that counsel is arguing and summing up,

and this is not an appropriate cross-examination of this witness.

The Court: I think you are arguing with the witness.

Mr. Somers: All right. I will not. I am sorry.

Q. Mr. Murphy, did you compare him mentally or in any

other way with the description that you had gotten from Jesse Colson as to his height, his weight, his apparent age? A. No.

Q. You did not? A. No.

Q. You didn't think that was necessary, that was required. You just picked him up as Leon? A. His picture was identified by two people.

Q. Just a moment. Please respond to my questions.

Mr. Starkey: I submit the answer was responsive.

Q. (Continuing) Just respond to my questions.

The Court: Just ask him a question, please.

Q. (Continuing) Mr. Murphy, did it ever occur to you, after you had arrested him and looked him over, that he didn't quite fit in with that description? A. No.

Q. You felt that he did? You felt that this man, whom you had in custody, was five feet nine, was indeed 165 pounds; is that correct? He was indeed about 40 years of age, is that correct?

Mr. Starkey: Your Honor, first of all I will ask that counsel ask one question at a time, and again that he refrain from arguing with the witness.

—1510—

The Court: I think the witness has said time and again that he arrested this man on the basis of a photograph which he had in his hand.

Mr. Somers: I see. I am asking him now, if your Honor please, whether or not this particular description which he had gotten from Colson, upon which apparently the defendant was arrested and named in the indictment by that description, did indeed fit the description of the suspect.

The Court: I will sustain the objection to that, because that is argument. That is a question for the jury. You will be given an opportunity to argue to the jury, but there is no use in arguing with this witness. Let us proceed.

Q. So that let us bring you down to this: Jesse was arrested in 1959, July of 1959; is that correct? A. That is correct.

Q. And then you testified that you had eighteen or twenty conversations with Jesse?

The Court: He said that.

Q. About twenty conversations. Jesse had originally been held in $50,000 bail, and after talking to you bail was reduced to about $3500? A. That's correct.

—1511—

Q. And he was released on bail? A. Yes.

Q. And he was out in the street? A. Yes, sir.

Q. About when would you say he was out in the street? August or thereabouts? A. Some time in August.

Q. In August of 1959? A. '59, right.

Q. And we know that you didn't pick up this defendant, Leon Aiken, until May of 1961? A. That is exactly correct. Right.

Q. Now, you told Jesse, "Go out and pick up this man you described as Leon." Is that correct? A. I told Jesse Colson that if he sees him, if he gets any data on him, where he could be located, it would help me in apprehending him, so please do so. He is known more around those circles than I am.

Q. And after you had gotten this information from Jesse, and before you arrested Mr. Aiken, somewheres in between that time you presented your findings, your results from your investigation to the United States attorney for prosecution, is that correct, for whatever purpose the United States attorney wanted to use it for? A. Yes. I brought him in to speak to the United States attorney.

—1512—

Q. You were present when this man was described as Leon. You heard him describe this man by the description that we now find in the indictment; is that correct? A. Yes.

Q. And subsequently thereafter, this evidence was presented, some time in March or very late in February, to the federal grand jury in the building; is that correct? A. I surmised, yes.

Q. Do you know whether or not Jesse Colson testified? A. I believe he did; yes, sir.

Q. And you testified too, didn't you? A. No. Not in this indictment.

Q. You did not testify before the grand jury? A. In this particular indictment?

Q. Yes. A. No.

Q. Oh, my impression was that you had, because there was some talk about your grand jury testimony. Am I mistaken about that? A. This is prior to Aiken's arrest.

—1513—

Q. Mr. Murphy, I don't want to confuse you. I am speaking of this particular proceeding, not only of Aiken's arrest.. Of this particular proceeding.

Mr. Starkey: I submit, your Honor, that the witness and counsel are talking about the same thing, and that his testimony is accurate.

The Court: When did you testify before the grand jury? How long ago?

The Witness: In 1958.

Q. And you know that Colson testified thereafter?

Mr. Starkey: If I may interrupt, your Honor, I did request, during the luncheon recess, that the grand jury minutes of which Agent Murphy spoke be transcribed, and I have them here at this time. The government has no objection, if the Court is inclined, to delivering them to defense counsel.

The Court: Please do so.

Mr. Starkey: May I have them marked as a Court exhibit?

(Marked Court's Exhibit 21 for identification.)

Q. But before this indictment was voted and filed, on the 3rd of May, you knew that a person by the name of Leon was involved in this particular trap; is that correct? A. Yes.

—1514—

Q. And you knew the person whom we know as Leon, whose last name was unknown to you, was, according to Jesse, about forty years old, weighed 165 pounds and was about five feet nine; is that correct? A. Five feet nine and a half. In or around there.

Q. Didn't you think it very important to mention that he was of very dark complexion?

Mr. Starkey: Wait a minute, your Honor. I object to that as—

The Court: Sustained. There is no basis for that.

Mr. Somers: Will your Honor hear me for one moment on that?

The Court: Yes.

Mr. Somers: Specifically in the course of the testimony during this trial there has been mention that the defendant was light complected. The very words—light complected.

The Court: That is what the indictment says.

Mr. Somers: No. The indictment was "medium complexion."

The Court: Oh, I am sorry.

Mr. Somers: Now let the jury see whether or not

—1515—

this man was medium complected. He has now referred to him today for the first time as very dark, in his examination on the stand today, very dark, indicating that he is a very Negroid man.

The Court: Mr. Somers, that is all a matter of argument.

Mr. Somers: But this is cross-examination.

Finbarr J. Murphy—for Government—Cross

The Court: But you can't argue even on cross-examination, so let us proceed.

By Mr. Somers:

Q. Did you tell Mr. Starkey what you thought of the color of this man, whether it was light, medium or dark, this man, Leon?

Mr. Starkey: Your Honor, I will object to this. At the time that this indictment was voted and evidence was presented, Agent Murphy has testified he had not seen him. He didn't know what he looked like.

Mr. Somers: Of course he didn't. That is exactly it.

The Court: Now that you have made that point, let us go on to something else.

Mr. Somers: He described it. We know he didn't know him.

—1516—

Mr. Starkey: There is no evidence that Agent Murphy described the individual to me, either.

The Court: All right. Let us proceed.

I think the witness testified that Colson described the defendant to the United States attorney, the assistant United States attorney. So let us proceed.

By Mr. Somers:

Q. So that when this indictment was presented to the grand jury, the grand jury was in possession of all the facts as Colson had given them to you, with relation to this man, Leon?

Mr. Starkey: I will object, your Honor. Counsel knows full well that the agent could not be in the grand jury at that time.

The Court: I sustain the objection.

Mr. Somers: Withdrawn.

Q. But in any case, you told Mr. Starkey, or the United States attorney's office, his predecessors, Calanda, Palermo, all about what Jesse told you with respect to the man, Leon? A. I believe so, yes.

Q. Incidentally, when was it Jesse opened up for the first time to you and mentioned this man, Leon? A. Around in August of 1959.

—1517—

Q. Do you recall what he told you about Leon? A. Yes. He told me about him in United States Attorney Palermo's office.

Q. I mean, he told you about him, but did he tell you that he had done business with him, and so forth? Let me know what he told you he had done with Leon? A. He said Leon was a big connection for him towards the end of his dealing in cocaine. He told me that Leon took two of the loads that came up from Chile via the Chileans.

Q. So that Leon at this point was known to you as the most important man in this combination, from the money point of view; is that correct? A. The biggest buyer, yes.

Q. He was a very big fish in this pond, wouldn't you say? A. That's right.

Q. And didn't you feel, as a Customs officer, as a law enforcement officer, as a narcotics man, that it was very important to catch this big fish? A. Yes. Once you have him identified, yes, bring him in.

Q. Yet you took, according to your testimony on cross-examination by Mr. Pogoda, a few minutes ago—you took

—1518—

no very positive steps to apprehend him?

Mr. Starkey: Your Honor, I will object to that as counsel's confusion. I think the witness—

The Court: Sustained. We have been through this.

Q. You heard here in court several days ago Schoolboy testifying that he made repeated deliveries and met on repeated occasions Aiken, Leon Aiken, at 136th Street? A. Yes.

Q. Now, always between Lenox and Seventh Avenues, he said, and that was always where he went to find him; is that correct? You heard him say that? A. He was known in the neighborhood; yes.

Q. Did you know that before you heard about it here in court? A. I knew that spot. I knew other spots: 125th Street. He was a man about town. I knew that.

Q. Yet, it took two years before this man was picked up. Even you knew—

Mr. Starkey: Your Honor, I will object. Two years from what? He talks about Schoolboy's testimony—

Mr. Somers: I will make it very definite.

—1519—

Q. (Continuing) Yet, despite the fact that in August, 1959, you knew about this big fish in this puddle, and you knew where he could be found, you say that it took two

years, it was not before two years that he was apprehended?

Mr. Starkey: Objection. It is argumentative.

The Court: I will sustain the objection. It is argumentative.

Mr. Starkey: Agent Murphy knew where to look at that time.

The Court: You are arguing to the jury.

Q. You said in this conversation with Aiken when you took him into West Street, you used the words verbatim. Do you know what "verbatim" means? A. Word for word.

Q. Is that all there was to the conversation? A. Was that all there was?

Q. Yes. The conversation you testified to between you and Aiken on the occasion when you brought him into West Street for incarceration. A. No. There was other conversation.

Q. Did you say to him, "I've got you on a cross"? Remember this now. Did you say to him, "I've got you on a

cross"? A. I may have, yes.

Q. And did you say, "I've got you on three counts. You are facing ten years minimum on each. That's thirty years for you"? A. No.

Q. You didn't say that? A. No. I told him if he is convicted he faces a minimum of ten years; yes, sir.

Q. On each count? Isn't that what you told him? A. On each count, yes.

Q. And that he had three counts? A. No.

Q. You didn't use that expression? A. No.

Q. And did you say to him—didn't you ask him whether

he had any connection with the Italian mob? A. Yes.

Q. You did? A. Yes.

Q. And didn't you say to him, "If you give us some dope on the Italian mob, it will go a whole lot easier for you"? You understand that? Words to that effect? Not verbatim. Did you? A. Yes. Eliciting information from a man, I could say that, yes.

—1521—

Q. You said to him, in short, that you had him on a cross. He was facing thirty years. You wanted some dope on the Italian mob.

The Court: I sustain the objection. You are summing up again, Mr. Somers.

Q. Let me know when you first met Leon Ellis. A. Leon Ellis?

Q. Yes. A. The date of the arrest.

Q. And that would be about April 4, am I right? A. What was the date of that?

Mr. Somers: What was it, Mr. Starkey?

Mr. Starkey: April 25th or something.

Q. Leon Ellis was arrested April 26th, following the filing of the indictment on March 3? A. That is correct.

Q. Were you looking for Leon Ellis? A. Yes; I was.

Q. Were you looking for Leon Ellis because he fit the description that Jesse Colson had given you about this male Negro of medium complexion, forty years old, five feet nine, 165 pounds? A. No. I knew Schoolboy was not Leon.

Q. You knew that? A. Yes. Positively.

—1522—

Q. Jesse spoke to you specifically and said, "There is a Leon Ellis and there is a Leon whose last name I don't know"? A. No. I asked him. Schoolboy is Schoolboy and Leon is Leon.

Q. Didn't you tell Mr. Pogoda that you didn't know Schoolboy's first name, and Jesse didn't tell you his first name? A. That's correct.

Q. When did you first find out that there was a guy by the name of Leon Schoolboy and a guy by the name of Leon Aiken? When did you find that out, and from whom? A. Schoolboy was identified through his prints. When I locked him up, I asked him his proper name. That's Leon Ellis. Now, what's the next question?

Q. How did you get his prints, by the way? A. How did I get his prints?

Q. Yes. A. I took them.

Q. But you must have apprehended him to get them. A. That's right.

Q. How did you come to apprehend him, I want to know? How did you come to arrest him? A. I arrested him under

—1523—

the federal narcotics rules. I didn't arrest him. Another Customs officer arrested him.

Q. Without revealing your source, what was the basis for the arrest? A. The basis for the arrest?

Q. Yes. Wasn't it because of the conversation that you had with Colson? A. No. No. I had another, independent source.

Q. Do I understand from you that Colson never brought Schoolboy into the conversation? A. You are losing me now on these questions.

Q. I don't want to lose you. You are losing me, too. Do

I understand that Colson never mentioned in the course of these eighteen or twenty conversations that he had with you and U. S. attorney's office, never mentioned the name of Leon Schoolboy Ellis? A. As I stated, Colson only knew Leon Ellis as Schoolboy.

Q. He didn't know his first name at all? A. No.

Q. And you found out, you arrested Schoolboy as a result of information that Colson gave you? A. Plus other, independent information.

Q. Plus other, independent information? A. Yes.

—1524—

Q. And then, after you printed him, you found in comparing his records with the FBI record and his prior convictions, that he was indeed Leon Schoolboy Ellis? A. Yes. The prints came back.

Q. This is when you knew it? A. Yes.

Q. And you charged him with a violation of the Harrison Laws, with possession of the six ounces of cocaine on the 12th of February, as we have discussed; is that correct? A. Violation of 173 and 174.

Q. Yes. That is what I mean. A. Yes.

Q. And that was around the 24th or 25th of April of this year? A. That he was under arrest; yes, sir.

Q. And you found out by comparing the prints who he really was and what his real name was? A. He told me when I arrested him.

Q. But up until then you only knew him as Schoolboy, because that is the only way he was referred to by Colson? A. That's right.

Q. I want you to take a look at Court's Exhibit 19. Do you recognize that? A. Yes. This is my report to

—1525—

Tendy.

Finbarr J. Murphy—for Government—Cross

Q. That is your report to Mr. Tendy, who is the United States attorney, chief of narcotics, here in the building; isn't that right? A. That's right.

Q. Is that the date you made the report? A. Yes.

Q. That is the date? A. Yes.

Q. November 25, 1959? A. Right.

Q. I show you item 7. Read that aloud, please.

Mr. Starkey: Wait a minute. One moment.

Q. (Continuing) Read it to yourself. A. (Witness examines.) Right.

Q. What does it say?

Mr. Starkey: Again, your Honor—

Mr. Somers: I will offer it, if he likes.

Mr. Starkey: No objection.

Mr. Somers: I will offer it.

Mr. Carluccio: I object.

Mr. Somers: I haven't read it, so I will withdraw the offer. I will refer to it.

Q. Does this refresh your recollection whether or not

—1526—

for the first time when you arrested Schoolboy in April of this year, that you for the first time, now, found out his name was in fact Leon Ellis? A. Well, according to that report I must have had his name.

Q. So you knew in November of 1959, months before he was arrested, a year and a half before he was arrested, that there was indeed another Leon involved in this case? A. Yes. In that report—

Q. Well, this is your report, isn't it? A. I wrote it.

Q. And in this report you referred to him as Leon Schoolboy Ellis? A. I gave him his full name, right.

Q. So you knew in November of 1959 that there was a Leon Ellis in the case? A. Right.

Q. So you were mistaken about learning for the first time— A. To the best of my knowledge, that's right.

Q. When did you get that information about Leon Ellis when you wrote Tendy in 1959 about it? When did you get that information? A. Well, that must have been from

—1527—

Colson, then, or this other fellow.

Q. That is right. So that in 1959, Colson advised you about Leon Ellis, or from advice that you got from Colson, as Schoolboy, you determined and found out that Schoolboy was Leon Ellis? A. I cannot state definitely whether it was Colson or my other source.

Q. But you knew that there was a Leon Ellis? A. I definitely knew. From that report, I definitely knew.

Q. So that when you presented all your evidence to Mr. Starkey for ultimate presentation before the grand jury, you were well aware of this picture of an individual by the name of Leon Ellis; is that correct?

Mr. Starkey: Your Honor, in the first instance I think counsel is shouting at the witness again—

Mr. Somers: That is a failing that I humbly apologize for. I do not intend to intimidate Mr. Murphy, and I do not think I am capable of it.

Mr. Starkey: In the second instance, your Honor, I think a statement that he was well aware at a given time is at variance with his testimony so far.

The Court: Let us proceed. I think it is clear from the witness' testimony that he did not know the name of Leon Ellis as Schoolboy in 1949.

—1528—

Mr. Somers: 1959, your Honor.

The Court: Yes. 1959. I think it is clear from the witness' testimony.

By Mr. Somers:

Q. You have seen this indictment? A. I have read through it once.

Q. Have you seen anywhere in this indictment the name Leon Ellis?

Mr. Starkey: Again, your Honor, I will object. The indictment speaks for itself.

The Court: The indictment speaks for itself, but I think counsel will stipulate that there is no Leon Ellis in the indictment.

Mr. Somers: All right, your Honor. And counsel will also, of course, stipulate that the only mention of Leon, other than Leon Aiken, as a defendant in the eighth count, is Leon in the title and the description of Leon; is that correct?

Mr. Starkey: The government will so concede, your Honor.

The Court: All right. Let us proceed.

Q. Do you know of your own knowledge whether or not, independent of this proceeding, the arrest of Leon Ellis, charged with the six ounces of cocaine, was succeeded by any further proceedings on the part of the government?

—1529—

Do you know this at all? This is your case, isn't it? A. I know of none.

Q. Nothing has happened since? A. Nothing.

Q. Other than what may have happened in connection with this case? I mean by that, Mr. Murphy, there is no

independent proceeding in which Leon Ellis is involved criminally with the United States attorney's office, so far as you know, with narcotics? A. No.

Mr. Somers: Will it be conceded that there is not?

Mr. Starkey: We have a complaint on which Leon Ellis was arrested, in evidence.

Mr. Somers: Will it be conceded that there is no further proceeding independently of that, counsel?

The Court: I think the witness will testify that he does not know of any.

Mr. Starkey: And the government will so stipulate.

Mr. Somers: That there is no other?

Mr. Starkey: That is right.

Q. When Aiken was arrested, he came into your office

—1530—

with Mr. Starkey or into Mr. Starkey's office with you, as the case may be, and he said his name was Leonard Royall Aiken? A. That's correct.

Q. And he said he knew Schoolboy? A. That's correct.

Q. Was he questioned whether or not he dealt in narcotics?

Mr. Starkey: I object at this time, your Honor. I am going to object to counsel attempting to put in a defendant by hearsay as a government witness. This exceeds the scope of the witness' direct examination, and I am going to object and press the objection. I do not think it is proper cross-examination.

The Court: Let us proceed. You cannot put in self-serving statements of this witness.

Q. You questioned him at the time, did you not, and you asked him if he knew a number of people by name, did you not, or Mr. Starkey did, one or the other or both of you? A. Yes. I left that for Mr. Starkey.

Q. And Mr. Starkey asked him whether he knew Schoolboy, and you testified that he said yes, he knew Schoolboy?

—1531—

A. Yes. During the statement he admitted knowing Schoolboy.

Q. Did Mr. Starkey ask him whether he knew Jesse Colson? A. I don't think so.

Q. You don't think he did? A. To the best of my knowledge, no.

Q. Do you know if he asked him if he knew Winston Massiah? A. I don't think so.

Q. Duke Anfield? You don't remember; is that it? A. No.

Q. You don't remember that? A. No.

Q. Did he at any time admit any traffic in narcotics?

Mr. Starkey: Again, your Honor, now I am going to object—

Mr. Somers: I will rephrase it, if I may.

The Court: Let the question be rephrased.

Q. Was there any discussion about narcotics among Mr. Starkey, you and Mr. Aiken at the time he was brought to Mr. Starkey's office?

Mr. Starkey: Objection.

—1532—

The Court: He has testified to a conversation already. Do you want to limit this question as to what happened in Mr. Starkey's office?

Mr. Somers: That is all. Nothing beyond that. There was only the one meeting so far as the evidence here concerned has brought out.

Mr. Starkey: I think that counsel is now trying to—

Mr. Somers: I will drop it. I will withdraw it.

Q. Incidentally, Mr. Murphy, can you tell us where Jesse Colson is now, if you know? A. Yes.

Q. Where? A. He is in the Federal House of Detention.

Q. Here in New York? A. Right.

Q. Do you know when you saw him last?

Mr. Starkey: I will object to that, your Honor.

Mr. Somers: When was the last time he saw him?

Mr. Starkey: I object, your Honor, and I think that is irrelevant.

—1533—

The Court: I think it is irrelevant.

Mr. Somers: No. I think it has a definite connection.

The Court: Why is it relevant?

Mr. Somers: Because I want to bring out in conversations, if it is so, subject to the commencement of this trial, certain information came out here in the trial that was not—

The Court: I will overrule the objection.

By Mr. Somers:

Q. When was the last time you saw Jesse Colson? A. I seen Jesse Colson last week, the beginning of the week, I believe.

Q. That would be during the course of this trial while this trial was in progress? A. Yes.

Q. Did you speak to him? A. Yes.

Mr. Somers: That is all at this time, your Honor.

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—1556—

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Redirect Examination by Mr. Starkey:

Q. Agent Murphy, did you make any arrest of defendants in this case without the authorization of the United

—1557—

States attorney? A. No. I was always advised by your office to make the arrest, except—yes. That's right. All of them.

Q. I believe you testified that you gave all the information to the United States attorney which you received from Colson so far as Aiken's physical description goes; is that correct? A. Yes. I believe I did.

Q. And did you in fact give every detail? A. No. I left out one detail.

Q. And that was? A. That was the fact about the darker shadings on his face.

Q. You were asked about whether or not Castro had any knowledge about the cocaine aboard the ship, and you answered yes. Will you tell the Court and jury what that knowledge was that he disclosed to you?

Mr. Carluccio: Objection, your Honor. It is beyond the scope of the—

The Court: I will sustain the objection. I think that we are getting into deep water there. Proceed.

Mr. Starkey: That is all.

—1558—

Recross Examination by Mr. Somers:

Q. Mr. Murphy, between the time you testified in response to my questioning and now, did you talk to Mr. Starkey? A. Oh, yes.

Q. Did you talk to him about the complexion of Leon Aiken? A. Yes.

Q. You did? A. Yes.

Q. And you now state that you forgot to mention that when you gave your information to the United States attorney? A. Yes. I figured Colson would do that.

Q. You figured Colson would do that. And you know, of course, that this indictment that was brought by the grand jury mentions this—

Mr. Starkey: Again, your Honor, I am going to object to charging the witness with the information found in the indictment.

The Court: The indictment speaks for itself. I think that is really a matter of argument, Mr. Somers.

Mr. Somers: All right.

Q. At any rate, since my questioning, you spoke to Mr. Starkey about the complexion of this man?

—1559—

Mr. Starkey: Your Honor, I will object to that. It is repetitious. The question has been asked and answered.

Q. (Continuing) And you said yes; is that correct?

The Court: I am not sure I understand the question. Are you asking whether or not—

Mr. Somers: Since my eliciting the fact on cross-examination that Mr. Aiken was a man of very dark complexion, he stated that he subsequently spoke to Mr. Starkey about Mr. Aiken's complexion.

Mr. Starkey: Your Honor, I will object to the characterization.

The Court: Let us cut through all this.

Did you talk to Mr. Starkey about Mr. Somers' examination with reference to the complexion of the defendant Aiken?

The Witness: Yes; I did.

Q. That was after my examination?

Mr. Somers: I just want to make that clear.

A. It was not the first time, but after; yes, sir.

Mr. Somers: Thank you.

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—1568—

New York, June 27, 1961,
10:30 A. M.

(Trial resumed.)

(Jury present.)

Mr. Somers: Your Honor, before we proceed, may I have just one minute with Mr. Starkey at the bench?

The Court: Yes.

(Discussion at the bench, out of the hearing of the reporter.)

The Court: Call your witness, please.

Mr. Starkey: The government calls Jack Caster.

Stipulation

Mr. Somers: Before you do that, can we have that stipulation on the record?

Mr. Starkey: Yes.

Ladies and gentlemen of the jury, counsel for the defendant Leonard Aiken and the government have agreed to stipulate to facts for the benefit of the expeditious proceed of this case, and that is that at the time of the arrest, at the time that Agent Murphy

—1569—

took Leonard Aiken into custody from the New York City Police Department, he found no narcotics in his possession or on his person at that time, and, secondly, that he did not search his apartment or his dwelling place at that time.

Mr. Somers: Thank you.

The Court: All right. Call your witness.

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The Court: Does the Government rest?

Mr. Starkey: Yes, your Honor.

The Court: All right. We will excuse the jury for a few minutes.

(The following transpired in the absence of the jury.)

The Court: All right. Is there a motion?

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—1587—

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Mr. Somers: • • • I take it that the only count that will be submitted to the jury with reference to the guilt or innocence of Leonard Aiken is the conspiracy count, Count 8.

Now, there, your Honor, I think the record has shown that this, at best—and I am accepting everything said with relation to Aiken, specifically the testimony largely of Schoolboy Ellis to be true—even if that were in fact true, all this defendant Aiken would be guilty of is a substantive count of violation and perhaps of the narcotic law. Not conspiracy, because there is nothing in the record to indicate that Aiken conspired with any of these co-defendants to either import, distribute—and so forth and so on.

If you could extend the theory that any man that does business with a man who imports narcotics is in effect a conspirator to violate the law, every single sale, every single purchase from a dealer of narcotics would in effect be a conspiracy to violate the

—1588—

law. I don't think that that is what the Act intends.

If Aiken is liable to the government for anything here, it would be on a separate, isolated substantive count of violation of the narcotics law and not of conspiracy.

Appreciating the fact, your Honor, that it takes two to make a conspiracy, and in that sense I anticipate Mr. Starkey's argument that the seller is in this instance Colson, the purchaser in some instance Aiken, who are between them conspiring, and thus forming the combination the law requires to constitute conspiracy of at least two people, we still have the question of an overt act.

Now, again, also appreciating and anticipating Mr. Starkey's argument that a conspirator is bound by the overt act of any of his co-conspirators in the

furtherance of this conspiracy, even though he himself—and in this instance Aiken—is not charged with any overt act personally, I submit that there has been no such overt act as between Colson and this man mentioned in this indictment that could constitute what the law requires to be a conspiracy, namely, the combination of two or more people to violate the law, and an overt act in furtherance of it.

—1589—

Because of that, I submit, Your Honor, that the government has failed to make out a prima facie case as a matter of law under Count 8 against Leonard Aiken.

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—1596—

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The Court: The Court is ready to rule.

The ruling is that the motions for judgment of acquittal are all denied, with the exception of Mitchell Anfield's motion with reference to Counts 1 and 2. With reference to Counts 1 and 2, judgment of acquittal will be entered as to Mitchell Anfield.

We will take a five-minute recess.

(Short recess.)

The Court: The government has rested. In connection with the Court's rulings, the evidence heretofore restricted to the eighth count is now admitted as to defendant Massiah on Counts 1, 2 and 7.

As the Court understands it, the defense will now rest.

Do all defendants rest?

(All defense counsel nodded affirmatively.)

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Motion to Dismiss Count 8

—1598—

AFTERNOON SESSION

1:30 P.M.

The Court: Ladies and gentlemen of the jury, summation of counsel for the defendants will now begin.

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—1698—

New York, June 28, 1961,
10:00 o'clock a.m.

Trial resumed.

Mr. Somers: Your Honor, can Mr. Starkey and I, for one moment, approach at the bench?

The Court: Yes.

(The following discussion at the bench:)

Mr. Somers: The defense having rested, your Honor, I now move for a dismissal of the eighth count of the indictment, and I respectfully direct your Honor's attention, first, to paragraph 1, and I direct that motion to paragraph 1, on the ground that there has been absolutely no testimony linking the defendant Leonard Aiken with the allegation in Count 1 which has to do with the importation of narcotics.

Mr. Starkey: It is Count 8, sir.

Mr. Somers: I mean paragraph 1. I want to limit Count 8 to paragraph 1 alone for the first consideration. There is no consideration linking this man to a conspiracy with respect to paragraph 1 in Count 8.

—1699—

The Court: I deny that motion.

Mr. Somers: I make the same motion with respect to paragraph 2.

The Court: Same ruling.

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—1808—

Charge of the Court

New York, June 29, 1961
10:30 o'clock a.m.

(Wright, J.)

(Jury present.)

The Court: Ladies and gentlemen, you have heard the evidence and the arguments of counsel, and now it becomes my duty to give you the law governing this case.

It is your duty to accept the law as it is given to you by the Court, and to determine the facts of the case for yourselves, and the proper application of the law of the case to the facts of the case as you find them determines your verdict.

I wish to make it very plain to you that the sole responsibility and the sole power in determining the facts is with you, and anything that I may say as indicating any view or opinion on the facts can only be advisory to you.

—1809—

Now, there are some general principles of law which are of importance in every criminal case, and I wish first to make some statements that apply to criminal cases in general, after which I shall endeavor to make clear to you what this particular case involves.

Charge of the Court

It is a principle well recognized in the law that every person who is charged with the commission of a crime is presumed to be innocent, and the burden rests upon the government to establish to your satisfaction beyond any reasonable doubt that the party is guilty as charged. This presumption of innocence remains with the defendant all through the trial of the case until, if ever, it is overborne by proof which convinces you beyond any reasonable doubt that the presumption of innocence no longer remains with him. So you look at all the evidence introduced in this case and ask yourselves whether or not you are satisfied beyond a reasonable doubt that the offense has been committed as charged in the indictment.

If you are so satisfied, then it will be your duty to convict the defendant or the defendants, but if there exists in your minds a reasonable doubt of his or their guilt you

—1810—

must then give them the benefit of that doubt and acquit them.

So, if there are two reasonable theories equally supported by the evidence, one of which is consistent with the guilt of defendants and the other consistent with their innocence, then you must adopt that theory consistent with their innocence and acquit them, because they could not then be said to be guilty beyond a reasonable doubt.

Now, the term "reasonable doubt" as used in this charge doesn't mean just any possible doubt you might have; it means such reasonable doubt as a careful, prudent and reasonable man or woman ought to entertain in the circumstances proved. It means a doubt based on reason which is reasonable in view of all the evidence.

It doesn't mean a vain, fanciful, or whimsical doubt, nor does it mean a possible doubt created by the reluctance

on the part of the jury to perform an unpleasant task. It means a doubt arising out of the evidence as based on substantial grounds, and one is said to be convinced in a case of this kind beyond a reasonable doubt when, after an impartial comparison and consideration of all the evidence, you can conscientiously say that you feel an abiding con-

—1811—

viction to a moral certainty of the truth of the charge. If there is a reasonable doubt in your minds about the guilt of the defendants on a charge in the indictment, they are entitled to the benefit of such reasonable doubt and an acquittal. If, on the other hand, you think their guilt is clear beyond a reasonable doubt, then you must find them guilty.

Now, the machinery of a trial calls for the exercise of varying functions, by counsel, by the witnesses, by the Court and by the jury. You, as the jury, exercise two important and exclusive functions. First, as you have been told, you are the sole judges of the facts; that is to say, it is you who must consider the evidence, weigh the evidence, and draw inferences from the evidence, but only from the evidence.

The law recognizes two kinds of evidence upon either or both of which juries may lawfully find an accused guilty or innocent of a crime. One is direct evidence and the other is circumstantial evidence.

Direct evidence is usually testimony of an eye witness concerning the facts in dispute themselves. Circumstantial evidence, on the other hand, is evidence which tends to prove a fact in dispute by proof of other facts from which a legitimate inference of the facts in dispute can be drawn.

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To put it another way, circumstantial evidence consists of facts proved from which you, the jury, may infer the

existence of the facts sought to be proved and which reasonably follow according to the experience of mankind.

Now, evidence is sometimes given by accomplices in a criminal trial. It is the universal rule in the Federal Court that defendants may be convicted on the uncorroborated testimony of accomplices alone. Nevertheless, the testimony of an accomplice should be scrutinized carefully and viewed with great caution.

Also with reference to accomplices, if the government has failed to call a witness, whether he be accomplice or otherwise, who is equally available to both sides, you may not draw an inference that the testimony of that witness would have been unfavorable to the prosecution.

You must also, in determining what the facts are, distinguish between mere arguments which are made before you and the evidence upon which those arguments rest. The repetition of an argument, however often, doesn't constitute evidence. You must carefully analyze the assertions

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which are made to you by either side and see what bases those assertions have in the evidence.

Now, your second exclusive function—first is the finding of the facts. Secondly your exclusive function is passing upon the credibility of the witnesses.

Now, you can see this is a very important function because to determine where the truth lies you must, of necessity, decide who is telling the truth. How you ought to do this is left to your own determination as men and women with human experience in the affairs of life.

Among other things, in determining the credibility of a witness the jury may consider his manner and demeanor on the witness stand, his interest, prejudice or bias, if any, whether he has a purpose to serve which might color his

testimony, his means of knowing what he has testified to, the probability and possibility of his testimony, the consistency or inconsistency of his statements, the reasonableness or unreasonableness of his statements in view of all the circumstances surrounding that testimony, including whether or not he has been contradicted by other credible evidence and whether or not he has made state-

—1814—

ments at other times and places contrary to those made on the witness stand.

The jury is not bound to believe unreasonable statements just because they are sworn to, for we know that anyone can swear to anything if he has the will to do so.

If conflicts in the testimony of the witnesses exist, it is your duty to reconcile them without imputing perjury to any witness. But if you find that a witness has wilfully and falsely testified on a material matter, you should, of course, disregard that false testimony and you may, if you choose, disregard any and all testimony by such witness. The credibility of the witnesses and the weight of their evidence are matters solely for your determination. The Court cannot help you in this. You are the exclusive judges in determining where the truth lies.

Now we come to the proposition that in entering upon the final stage of this case your responsibility is to take the evidence, weigh it, and, considering the charges made in the indictment, render a just verdict, a verdict that is just to the government of the United States, a verdict that is just to these defendants.

—1815—

Now, this brings us directly to the charges themselves. The charges are in the form of an indictment. As it has been explained to you previously, an indictment is not evidence, and no inference whatever may arise from the fact that an indictment has been found in this case or in any

other case. It is merely a charge. It is merely the means by which defendants may be placed on trial before a jury such as you so that you may decide their guilt or their innocence without drawing any inference whatever from the facts of the indictment.

Now, in this particular indictment, and as far as this trial is concerned, we are interested in four counts: Counts 1, 2, 7 and 8.

In 1, 2, and 7 there is only one defendant on trial. That is the defendant Winston Massiah. He is the only defendant on trial in 1, 2 and 7.

In count 8, which is the conspiracy count, all four defendants are named, all four defendants are on trial on that count, the conspiracy count.

Now, the statute which Winston Massiah is accused of violating in count 1 of the indictment reads as follows—this is from the Criminal Statutes of the United States—

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> "Whoever brings on board or has in his possession or control on board, on any vessel of the United States, while engaged in a foreign voyage, any narcotic drug not constituting a part of the cargo in the manifest or part of the ship's stores, shall be prosecuted."

Now, in order to find the defendant Massiah guilty of the crime charged in count 1 in the indictment you must be convinced beyond a reasonable doubt on each one of these elements of the offense. If you have a doubt about any one of these elements, a reasonable doubt about any one of these elements, then you must bring in an acquittal.

First, that on or about May 6, 1958, in the Southern District of New York, the defendant Massiah either brought

a narcotic drug on board, or had a narcotic drug in his possession on board the S/S Santa Maria.

Now, the narcotic drug which is sought to have been proved in this case is cocaine, and if you find that it was cocaine, then you will also find that it is a narcotic drug because as a matter of law cocaine is a narcotic drug.

The second element which you must find to be proved

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beyond a reasonable doubt is that the substance marked in the Government's Exhibits, 9-A-E and 11-A, B—those are the two exhibits which form the part of the alleged cocaine found in the after peak of the Santa Maria—you must find that they are narcotic drugs. And in connection with that particular element you will remember the testimony of the chemist who made tests in connection with these particular exhibits.

The third element, that at the time the Santa Maria was a vessel of the United States, that is, registered pursuant to the law of the United States and flying an American flag.

And fourth, that at the time the Santa Maria was engaged in a foreign voyage, that is, traveling from ports in this country to ports outside this country.

And fifth, that the narcotic drug didn't constitute a part of the cargo entered in the manifest or part of the ship's stores.

Now, those are the five elements of count 1, each one of which must be proved to your satisfaction beyond a reasonable doubt before there can be a conviction as to count 1.

The statute which defendant Massiah is alleged to have

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violated in court 2 reads as follows, in pertinent part: It is unlawful to import or bring any narcotic drug into

the United States except such amounts as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate use.

Whoever fraudulently and knowingly imports or brings any narcotic drug into the United States contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit such an offense shall be punished.

Now, that is the statute which is involved in count 2.

In order to find the defendant Massiah guilty of count 2 you must find beyond a reasonable doubt proof of every element of that crime. Those elements are, first, that on May 6, 1958, the defendant Massiah either received, or concealed, or sold, or in any manner facilitated the transportation or concealment of a narcotic drug;

Second, that the substance marked as Government's Exhibits 9 and 11—those are, again, the after peak disclosures

—1819—

—are narcotic drugs;

Third, that these narcotic drugs were illegally imported into the United States;

And fourth, that the defendant knew that these narcotic drugs had been illegally imported into the United States.

Each one of these elements of count 2 of the offense charged in count 2 must be proved to your satisfaction beyond a reasonable doubt before there can be a conviction of the defendant Massiah as to count 2.

Now, as previously stated, it will be necessary for you to decide whether the Government has established the elements of illegal importation, and the defendant's knowl-

edge of illegal importation of the cocaine mentioned in count 2 of the indictment.

However, Title 21, U. S. Code, Section 174, provides further that whenever on trial for a violation of this section—and that is the section concerning count 2—the defendant is shown to have or to have had possession of a narcotic drug, such possession shall be deemed such evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Thus, under the law possession of narcotics gives rise

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to an inference that the narcotics were imported contrary to law, and a further inference that the person in possession had knowledge of such unlawful importation. This means that you would be authorized to convict the defendant who didn't explain his possession of the narcotics or whose explanation you disbelieved.

The word "possession," as I have used it in this charge doesn't necessarily mean only actual physical possession of narcotics; it means also such control of narcotics as could be exercised through agents. In short, it is not necessary under the law for the Government to prove that the defendant had actual physical possession of the cocaine mentioned in the indictment. Proof of constructive possession or control is sufficient for you to invoke the statutory presumption which I have read to you.

The statute which Winston Massiah is accused of having violated in count 7 reads as follows:

It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package, and the absence of appropriate tax-paid stamps from narcotic drugs shall be prima facie evidence of a violation

—1821—

of this sub-section by the person in whose possession the same may be found.

In order to find the defendant Winston Massiah guilty of the crime convinced beyond a reasonable doubt as to each of these elements of the offense.

First, that on or about May 6, 1958, in the Southern District of New York, he either purchased, sold, dispensed, or distributed a narcotic drug;

Second, that the substances marked Government's Exhibit 9 and Government's Exhibit 11 are narcotic drugs;

And third, that he didn't purchase, sell, dispense or distribute the narcotic drug in or from the original stamped package.

As I have already stated, the first element of this offense is that the defendant Massiah either purchased, sold, dispensed or distributed a narcotic drug. As to this element you are instructed that it is not necessary for you to find that the defendant did all of these prohibited actions. If you are convinced beyond a reasonable doubt that he did any one of them and you find that the elements exist, you are authorized to convict.

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Also, as previously stated, the third essential element of the crime charged is that you find beyond a reasonable doubt that the defendant Massiah didn't purchase, sell, dispense or distribute the narcotic drug in or from the original stamped package. In this regard I charge you that Section 4704(a) of the Title 26 of the United States Code provides that the absence of appropriate tax-paid stamps from narcotic drugs shall be prima facie evidence of a violation of this sub-section by the person in whose possession the same may be found.

Again, under this count the word "possession" as I have used it doesn't necessarily mean only actual physical possession; it also means such control of narcotics as may be exercised through agents. In other words, it includes constructive possession as well.

Now, that brings us to count 8. We are finished with counts 1, 2 and 7. This brings us to count 8, which is the conspiracy count. Section 371 of Title 18 of the United States Criminal Code provides, in part:

> "If two or more persons conspire to commit any offense against the United States, and one or more of such persons do any act to effect the object of the conspiracy, each shall be punished as provided by law."

That is the conspiracy statute which is the offense announced in the Criminal Code and which is the offense charged in count 8 of this indictment.

The conspiracy alleged in this indictment is to violate Sections 173 and 174 of Title 21, and the pertinent parts of those statutes read:

> "It is unlawful to import or bring any narcotic drug into the United States except such amounts as the Commissioner of Narcotics finds to be necessary for medicinal purposes. Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment or sale of such narcotic drug after importation, knowing the same to have been imported illegally, or conspires to commit any such action in violation of the laws of the United States, shall be punished."

You will note that the conspiracy charges in count 8 relate also to the same substantive offense which is the basis of count 2. That is the illegal importation and dis-

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tribution of narcotic drugs.

A conspiracy is a combination of two or more persons by concerted action to accomplish some unlawful purpose, or to accomplish a lawful purpose by unlawful means. Thus a conspiracy is a kind of partnership in criminal purposes in which each member becomes an agent of every other member.

The gist of the offense is a combination or agreement to violate or disregard the law. Mere similarity of conduct among various persons, and the fact that they may have associated with each other, and may have assembled together, and discussed common aims and interests doesn't necessarily establish proof of the existence of a conspiracy. However, the evidence need not show that the members entered into any express or formal agreement, or that they directly, by words spoken or in writing, stated between themselves what their object or purpose was to be, or the details thereof, or the means by which the object or purpose was to be achieved.

What the evidence must show in order to prove that a conspiracy existed is that the members in some way came to a mutual understanding to try to accomplish a common

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and unlawful plan. It is not necessary for the prosecution to prove that all the means or methods set forth in the indictment were agreed upon to carry out the conspiracy, or that all the means or methods were actually used or put into operation. But it is necessary that the evidence establish to the satisfaction of the jury that one or more of the

means or methods described in the indictment was agreed upon to be used in an effort to accomplish some object or purpose of the conspiracy as charged in the indictment.

One may become a member of a conspiracy without full knowledge of all the details of the conspiracy or of all of the conspirators.

On the other hand, a person who has no knowledge of a conspiracy but happens to act in a way which furthers an object or purpose of the conspiracy doesn't thereby become a conspirator. Before a jury may find that a defendant or any other person has become a member of a conspiracy the evidence must show that the conspiracy was formed and that the defendant or other person who is claimed to have been a member knowingly and wilfully participated in the unlawful plan with the intent to advance and further some object or purpose of the conspiracy.

To participate knowingly and wilfully means to partici-

—1826—

pate voluntarily and understandably and with specific intent to do some act which the law forbids, or with specific intent to fail to do some act which the law requires to be done; that is to say, to participate with bad purpose either to do bad or to disregard the law. So if a defendant or any other person with understanding of the unlawful character of a plan intentionally encourages, assists, advises, for the purpose of furthering the undertaking or scheme, he thereby becomes a knowing and wilful participant in the scheme, a conspirator.

The question of intent, the intention to be a conspirator, is a matter for you to determine. And as intent is a state of mind and it is not possible to look into a man's mind to see what he is thinking, the only way you have of arriving at intent in this case, or in such case, is for you to take

into consideration all of the facts and circumstances shown by the evidence, including the exhibits, and determine from all the circumstances and facts what the intent of the defendants was at the time in question.

Thus direct proof of wilful or wrongful intent or knowledge is not necessary. Intent and knowledge may be in-

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ferred from acts and such circumstances as may arise from a combination of acts although each act, standing by itself, may seem unimportant. These are questions of fact to be determined from all of the circumstances.

One who knowingly and wilfully joins an existing conspiracy is charged with the same responsibility as if he had been one of the instigators of the conspiracy.

In determining whether or not a defendant or any other person was a member of a conspiracy the jury isn't to consider what others may have said or done; that is to say, the membership of a defendant or any other person in a conspiracy should be established by evidence as to his own conduct, what he himself said or did.

If and when it appears from the evidence that a conspiracy existed, and that a defendant was one of the members, then the acts thereafter knowingly done, and the statements thereafter knowingly made by any person likewise found to be a member may be considered by the jury as evidence in the case as to any defendant found to be also a member of the conspiracy even though the acts and statements may have occurred in the absence and without the

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knowledge of the defendant, provided such acts and statements were knowingly done and made during the continuance of the conspiracy and in furtherance of the object or purpose of the conspiracy. Otherwise any admission or in-

criminatory statement made outside of court by one person may not be considered as evidence against any person who was not present and did not hear the statements made.

The arrest of one of several co-conspirators effectively terminates the arrested conspirator's participation in the conspiracy.

Statements made by such a person after arrest bind only him, the person making the statement. They may not be considered in determining the guilt or innocence of other persons not specifically joining in such statements.

Also, the arrested member or members of the conspiracy are only bound by those acts and declarations of their co-conspirators made prior to their arrest. However, the unarrested conspirators are bound by the acts and declarations of the unarrested co-conspirators made in furtherance of the conspiracy if such acts and declarations were made at any time during the existence of the conspiracy.

In your consideration of the evidence as to the offense of

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conspiracy charged you should first determine whether or not the conspiracy existed as alleged in the indictment. If you conclude that such a conspiracy did exist, you should next determine whether or not the defendants knowingly and wilfully became members of the conspiracy.

If you find that the evidence beyond a reasonable doubt is that the conspiracy was knowingly and wilfully formed as alleged in the indictment, and that the accused on trial knowingly and wilfully became members of the conspiracy at the inception of the plan or afterwards, and that thereafter one or more of the conspirators knowingly committed, in furtherance of the conspiracy, one or more of the overt acts charged, then the success or failure of the conspiracy to accomplish the common purpose is immaterial.

Charge of the Court

By the term "overt act" is meant any act committed by one of the conspirators in an effort to effect or accomplish some object or purpose of the conspiracy. The overt act need not be criminal in nature if considered separate and apart from the conspiracy. It may be as innocent as the act of a man walking across the street, or driving an auto-

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mobile, or using a telephone. It must, however, be an act which follows and tends toward the accomplishment of a plan or scheme, and must be knowingly done in furtherance of some object or purpose of the conspiracy charged in the indictment.

In order to establish the offense of conspiracy charged in this indictment the evidence must show beyond a reasonable doubt, first, that the conspiracy described was formed and existed at or about the time alleged. Second, that the accused knowingly and wilfully became members of the conspiracy. Third, that one of the conspirators thereafter knowingly committed at least one of the overt acts charged in the indictment on or about the time alleged, at the time and place alleged. And fourth, that such overt act was committed in furtherance of some object or purpose of the conspiracy as charged.

If you find from the evidence beyond a reasonable doubt that existence of a conspiracy charged in the indictment has been proved, and that during the existence of the conspiracy one of the overt acts alleged was knowingly done by one of the conspirators in furtherance of some object or purpose of the conspiracy as charged, proof of the conspiracy offense charged is then complete, and it is complete

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as to every member found by you to have been knowingly and wilfully a member of the conspiracy at the time the

overt act was committed regardless of which of the conspirators did the overt act.

Now, finally and in conclusion let me say that it is your duty to weigh the evidence carefully, dispassionately, calmly, and to reach a conclusion about the facts of the case which is wholly within your findings; the sole and only question for your consideration is whether the defendants are guilty or innocent of the offense on trial. If you are satisfied beyond a reasonable doubt that they are guilty, it is your plain duty to convict them.

If, on the other hand, you have a reasonable doubt about the matter, it will be equally your duty to acquit.

Now, all 12 of you must agree, whichever way you find. In other words, your verdict must be unanimous. You must consider each count separately; you must consider each defendant separately.

You must determine first whether the defendants on trial are the defendants named in the indictment. And if you find that they are, you will then decide whether or not they

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are guilty of the offense charged in the indictment.

You will take up count 1 first. Winston Massiah is the only defendant named in count 1 and on trial on count 1. You will decide whether he is guilty or innocent. The form of your verdict may be "We the jury find the defendant Massiah guilty on count 1," or "We the jury find the defendant Massiah not guilty on count 1."

Then you will proceed to a consideration of count 2 of the indictment, and there, again, you will make a determination as to the guilt or innocence of the defendant Massiah, since he is the only defendant on trial as to count 2.

Then you will proceed to count 7 of the indictment, and again you will make the same determination of guilt or

innocence as to the defendant Massiah since he is the only defendant on trial as to count 7.

In proceeding to count 8 you will find four defendants on trial charged with conspiracy as outlined in the indictment. You will take each defendant separately. You will determine whether or not these defendants on trial are the

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defendants named in the indictment, and if you find that they are, then you will proceed to decide whether or not they are guilty of the charge in the indictment, that is count 8. As I have stated, you will take each defendant separately.

The form of your verdict as to count 8 should be "We the jury find the defendant Winston Massiah guilty," or "We the jury find the defendant Winston Massiah not guilty on count 8." And then the same with reference to Mitchell Anfield, guilty or not guilty, specifically as to him, specifically as to count 8; and then Icky Thorn, specifically as to him, specifically as to count 8; and then Leonard Aiken, specifically as to him, specifically as to count 8.

The court will give you a copy of the counts of the indictment which are on file here to assist you in your deliberation.

Unless the jury requests exhibits or testimony of any kind it will not be furnished to the jury. The jury should first try to determine the case on the basis of your total recollections of the exhibits and the testimony, and if you want assistance from either or both, on request you may have it. You will write your requests or any other messages

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that you have for the Court on a piece of paper which will be provided by the deputy marshal, and he will make this communication available to the Court.

(In the robing room.)

The Court: Are there any exceptions to the charge?

Mr. Somers: Just this, your Honor: I noted in your charge to the jury with respect to Winston Massiah that you mentioned both in connection, I believe, with the possession, and with the failure of the stamps on the tax count, that that in and of itself, if unexplained, may indicate the guilt of the defendant.

In connection with that, Judge Wright, I should very much appreciate it if you would instruct the jury that the defendants are not called upon at any time to take the stand, and even though that may make a prima facie case against them which, if unrebutted, they may decide doesn't raise a reasonable doubt, they can not make any inference whatsoever from his failure to take the stand, as to his innocence or guilt.

Am I a little verbose in that, Judge Wright?

The Court: I think your point will be made more simply

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and more clearly to the jury if I tell the jury that no inference whatever should arise from the fact that the defendants didn't take the witness stand, that they have a right to remain silent, and put the government to full proof.

Mr. Somers: That is right. That the burden, at all times —I think in that respect it was a little equivocal there. The jury may say, "Well, he had a right to explain this and his mere failure to do so—"

The Court: All right, I will do that.

Mr. Somers: And then to instruct the jury that the failure on the part of the government to produce a witness available only to the government might raise an inference

on the part of the jury that if the government had called such witness solely available to the government, his testimony would have been unfavorable to the government.

The Court: I will deny that.

Mr. Somers: You will deny that?

The Court: Yes. The reason is that I don't know of any witness who was available to the government alone.

Mr. Carluccio: You mean we could have brought Massiah

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in?

Mr. Somers: No. Colson.

I suppose we could on a writ.

The Court: There is no question about that.

Mr. Somers: One other thing, your Honor, that if the jury finds, after due deliberation, that the evidence equally points to the possibility that the defendant named as Leon in the indictment might be Leon known as Schoolboy Ellis, or Leonard Royal Aiken, they must acquit.

The Court: Well, I will deny that, too. I think I have covered it and you argued it very well, so I think I have covered it without pointing it up.

Mr. Somers: Judge, you see, you and I know so much more about these things than the jury does. This is a brand new jury. I don't think it would hurt, and I think it is proper if you would tell them, in your own language, that if they find, during the course of their deliberations, that this might have been Leon Schoolboy Ellis named in the indictment, since it is so vague and only by description, or it might have been Leonard Royal Aiken, then they must acquit because they are not convinced beyond a reasonable doubt that this defendant mentioned in the indictment is Leonard Royal Aiken.

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The Court: I think I have covered it.

What is your next point?

Mr. Somers: That is all, Judge.

Mr. Archer: The only point I wanted to make is already covered by Mr. Somers.

Mr. Carluccio: Your Honor, I think it was request 17—I looked—of Mr. Starkey's requests—which has a point that is sort of irreconcilable. You say at one point that they have no duty to come forward, and at the next point you say that he has a duty to explain it away, but I think the point that I would like to make is that the first question is whether Massiah possessed it, and that is the question that the jury has to determine.

And in addition, when you said "constructive possession through agents," I go along with constructive possession, but there is no proof whatsoever that he possessed it through agents. So I would request from your Honor sort of an amplification of this point in your charge, that there is no burden upon the defendant to come forward, that you make some mention to say that, anything said heretofore notwithstanding, or that you will clarify this point because both Mr. Somers and I didn't see any

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incongruity in that situation.

The Court: My feeling is that I should handle it broadly in the way I have indicated to Mr. Somers, and tell the jury, in effect, that the fact that the defendants didn't take the stand must not give rise to any inference whatsoever, and they have a right to remain silent and put the goverment to full proof, and no inference should arise from the fact that they have not taken the stand, and I think that makes your point. To get into this you get all involved.

Mr. Carluccio: Although it seems incongruous, but unless you could make it with reference to Massiah, unless you also add the point that in order for him to—no, then you will have to talk about possession. If you make that point strong enough, your Honor—

The Court: Let me ask you this. This is what I was thinking about: I had hoped they would take these names out of the indictment, but I thought I would let the jury have this.

Mr. Somers: That is entirely satisfactory to me, your Honor.

The Court: There is no change otherwise. It is a clean indictment.

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Mr. Starkey: I would offer my apologies, your Honor. When you requested that the names be stricken, I didn't understand the Court to mean excised.

The Court: Do you have any point about the charge?

Mr. Starkey: No, your Honor, I don't. I had in mind a possible amplification on a witness who was in jail being available to both sides, but I don't think it is necessary.

The Court: All right, gentlemen, thank you very much.

(In open court.)

The Court: Ladies and gentlemen, as you were told at the outset of this trial that under our law defendants are presumed to be innocent, no inferences are to arise in any way from the fact that they have not taken the stand. Under our law the government has the burden of proving guilty beyond a reasonable doubt, and the defendants have a right, under our law, to rest on that presumption, and consequently no inference whatever can arise from the fact that the defendants failed to take the stand. They

have a right to remain silent and put the government to

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the full proof. So the fact that the defendants haven't taken the stand must not give rise to any inference for or against them.

You may now retire.

Swear the deputy marshals.

(Marshals sworn.)

(Whereupon, at 11:45 o'clock a.m. the jury retired to start its deliberations.)

The Court: Mrs. Goldberg and Mr. Roboff, I should like to take this opportunity to thank you for sitting through this trial. That is rather a bromide, but "Those also serve who only sit and wait."

It is perfectly obvious that we had to have you in a trial of this length where anything could happen by way of sickness to a juror and as a consequence we would need to have a substitute in the event one was not able to continue. I realized, after listening to the case, perhaps you would have some indication between yourselves as to whether or not you should be allowed to go forward with the case. It is kind of bringing you up to the mountain and showing you the promised land and then not letting you get to it.

I want to thank you for your conscientious efforts and

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you are excused without date.

(Two alternate jurors excused.)

(11:42 o'clock p.m. the jury sent out the following note:)

The Court: We have a note from the jury reading as follows:

Jury's Requests for Additional Instructions

"The jury would like to see the indictment."

So, if it is agreeable to counsel, I will simply have the deputy take the indictment in.

Make the message from the jury the next Court's exhibit.

(Court's Exhibit 22 marked for identification.)

(2:50 p.m. In the robing room.)

The Court: The jury has sent the following note to the court:

"May the jury see that portion of the transcript or hear that portion of it read that covers Massiah's conversation with Colson's car."

Now, will counsel state their positions with reference to the request of the jury?

Mr. Carluccio: I state for the defendant Massiah that I request that this portion not be read to the jury because it overemphasizes a portion out of perspective with the

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other portions of the testimony. The recollection of the jury is what controls, as your Honor has charged, in addition to which this particular portion, notwithstanding the fact that it is derogatory to the defendant Massiah, was vehemently questioned as to its admissibility in evidence.

This was a conversation by a government informer in furtherance of the government by way of what I call entrapment, with a small "e", so by virtue of the testimony it shouldn't be given, and it would put it all out of context.

The Court: The position of the defendant Thorn?

Mr. Archer: Well, I will go along in support of the contention made by the attorney for the defendant Massiah

and further state that I don't recall having voiced any opinion with reference to admitting any papers or relevant portions of the minutes with the other attorneys if they did make such arrangement with the U. S. Attorney.

The Court: Now for the defendants Anfield and Aiken.

Mr. Somers: On mature deliberation I join in the application of the other counsel that the jury recall this testi-

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mony as best it may without requesting or without the granting of any request on the part of the jury to have the stenographer read any particular portions of the testimony because I feel with counsel that that does unduly emphasize those particular references in reference to the whole of the testimony and that it would be unduly prejudicial and its probative value would be far outweighed by such possible prejudice.

The Court: The government's position?

Mr. Starkey: In the first instance, your Honor, on this question of reading to the jury the transcript of the testimony which becomes of importance in their deliberation, in light of the fact that this question was raised before the jury during my summation, at that point all counsel agreed that they should be permitted to hear such testimony in front of the jury, in the first instance, and I think that if they are not permitted to hear it they are entitled to know the reason why on this occasion, namely, that defense counsel have shifted their position and do make an objection of this kind.

In the second instance I think that, notwithstanding this change of position and this objection on the part of

—1844—

the defense, that the jury is deliberating and is entitled to whatever tools and instruments they might reasonably

use in an effort to facilitate their deliberations in their endeavors to reach a verdict, that it is customary practice in the Southern District of New York to permit them to have portions of the testimony concerning which doubts have been raised read back, and that if they have enough need of a clarification of that testimony to make a specific request in writing to the court, that the court, in the wise exercise of its discretion, should permit them the help they need under the circumstances.

I think that the rule or the practice of reading back testimony is no more unreasonable and no more unusual than that of permitting them any exhibits in the jury room which went into evidence which would facilitate their deliberations insofar as a verdict is concerned, and that the same rule and the same reasoning should be adopted insofar as this testimony is concerned.

The Court: Well, I understand that it is the uniform practice in the Southern District to read parts of the transcript to the jury. However, I am not aware of any case which allows the reading over the objection of counsel

—1845—

representing the defendants. It would seem to me that the advisability and desirability of reading back the transcript can be argued both ways: One, the reading could help the jury decide the case. On the other hand, however, it may be that reading only a part of the transcript to the jury and not the whole transcript to the jury might emphasize unduly that part which is read, and in view of the fact that counsel representing all the defendants are opposing the reading of the transcript to the jury, the jury is going to be advised that counsel have not been able to agree on the reading of the transcript, and con-

sequently the request of the jury will have to be denied with the suggestion that they recall the evidence for themselves.

I am not going to say that the defense counsel oppose it; I am simply going to say that counsel cannot agree, and the reason why I am saying that is, as counsel for the government stated, that there did seem to be some measure of agreement, at least as to reading some part of the transcript, and the Court, in its charge to the jury, did indicate that these portions of the transcript would be read to them if requested.

So I believe that it would be necessary, in these cir-

cumstances, to tell the jury why their request is being denied without saying which side or which counsel are opposing it.

Mr. Somers: Don't you think, your Honor, that justice would be best served if you just said that—if you just asked them to resort to their best recollection from memory rather than even mentioning that there has been opposition by counsel to its introduction?

Mr. Carluccio: The logic of Mr. Somers' remark is that if the testimony obviously would be derogatory to the defendants, especially to Massiah, it could be well inferred that one of the defense counsel would be against it and not government counsel.

Mr. Somers: Specifically since it was offered by the government and obviously these men—some of them who are of average intelligence, at least, can figure out that the government intends to stand by it, and if counsel objects to it the objecting counsel must be the defense.

I think it would be best if they were just told that they were to resort to the best recollection that serves them.

Jury's Requests for Additional Instructions

Mr. Carluccio: We will go by that ground rule, though,

—1847—

that on agreement we would try to agree in the future as each thing comes up—

Mr. Somers: No. I would suggest that the ruling be constant throughout the trial, that their best memory serve them.

Mr. Starkey: Your Honor, in this regard the government would take violent exception to the defense, and specifically defense counsel having the benefit of an exhibition of the kind that occurred before the jury of agreement that testimony be read back, and then a refusal to do so, and lack of an explanation being given as to the reason for it.

Mr. Somers: No, I can't go with that. All the Court has to do is to tell them that it is in the Court's discretion. The Court feels that the best interests of justice would be preserved if their memory prevailed.

Mr. Starkey: Counsel did say in front of the jury that they would have no objection, and now the jury isn't going to have what was agreed they should have at that time.

Mr. Carluccio: I believe it is necessary to at least tell the jury that counsel haven't been able to agree about the reading of the transcript because there did seem to be

—1848—

some measure of agreement between counsel as to the reading of the transcript. And in the Court's charge it did say to the jury that the transcript would be made available to them, so I would think that some reason for not reading the transcript now is required.

Mr. Somers: Your Honor might be able to best serve that by mentioning that this is a three weeks trial and if they are going to ask for testimony every few minutes

we might have to go through the whole three weeks all over again.

Mr. Archer: I think we ought to leave it up to your Honor to explain it to the jury.

Mr. Somers: If you say that counsel can't agree they must understand by that that this is an offer of government testimony, that the dissenting counsel certainly is not the government, it must be the defense and I think that would just defeat its purpose in telling them that, Judge.

You might just as well say that "I can't let him read this because of objection by defense counsel." It is saying it in a little bit different way, a little bit more euphemistically, perhaps, but I am sure they will grasp the fact that counsel who are objecting are the defense counsel.

—1849—

I think in fairness if your Honor just says that you feel that they should resort to their best memory, it will serve their purpose, and nobody will be prejudiced, despite Mr. Starkey's talk about vehement exhibitions.

Mr. Starkey wanted this opportunity for the jury to examine the records, I said it would be okey, and now you say it's best that they resort to their best memory and that way they can't be mad at Starkey or at me, either the government or the defense.

Mr. Starkey: I would object to the jury being misled in that regard. It was the judge's decision.

Mr. Somers: Well, if the judge hadn't brought that point to my attention—I am very grateful for it—I feel that he is absolutely right in that respect, that this taking it out of context does unduly pinpoint certain precise portions of the testimony that unduly prejudice the defendants because they can't read the whole testimony and have the

proper perspective with respect to the particular pinpointed testimony that they asked for.

Mr. Starkey: I submit to the Court, your Honor, that, although I don't have cases at hand, that this is a question

—1850—

of the Court's discretion, and that it would be an abuse of discretion to constitute error in this instance, that clearly—

The Court: Just a moment. We have another note from the jury.

> "May the jury see the portion of the transcript and hear that portion of the transcript that covers the information given to the customs officers by Torres."

Mr. Somers: Apparently they are considering Massiah throughout here at this point.

Mr. Carluccio: Your Honor, I think maybe we should clear up that point about whether there was an agreement to read certain portions. I think Mr. Somers said something about his man Leon, and maybe Mr. Pogoda might have said something about it.

Mr. Somers: I did, about Leon Aiken.

Mr. Carluccio: I didn't join in it, and if that was the situation I am sure that Mr. Somers wouldn't object to that portion if it is only that one portion, but I think on other portions—

The Court: Is the position of all counsel the same with respect to the second request to read the transcript?

—1851—

Mr. Carluccio: Yes, your Honor, especially so because with Torres there is a statement to the customs official that was marked for identification and never put in evidence.

Mr. Starkey: I submit, your Honor, that there is no question that a reading of testimony would be error any

more than there is question that submission of exhibits upon request to the jury would be error, and that, the objection of defense counsel notwithstanding, the Court should properly give the jury the tools it requests in furtherance of its deliberations.

The Court: Well, I am going to deny the request, so let's get on the bench.

(The following proceedings took place in open court.)

(Jury present.)

Mr. Starkey: Your Honor, with regard to the conversation just had, may I approach the bench with counsel?

The Court: All right, step up.

(The following proceedings took place at the bench.)

Mr. Starkey: Your Honor, I have a suggestion at this point which I think may well meet the objection raised by

—1852—

defense counsel insofar as the reading of the government's evidence concerning these conversations, and that is that —had it occurred at the time the testimony actually was given—cross-examination as well as direct examination concerning these matters be read to the jury and that way defendants will not be deprived of any rights, nor be the victims of any prejudice any more than they were at the time the testimony was actually taken.

Mr. Somers: We object to it, your Honor.

Mr. Archer: It will be like trying over the case.

Mr. Carluccio: And not only cross-examination, but you would also have to bring in the summation.

The Court: All right, same ruling.

Jury's Requests for Additional Instructions

(In open court.)

The Court: Ladies and gentlemen, the Court has considered the requests which have been made to read the transcript, and even though the Court did indicate in its charge that if the jury wanted parts of the transcript read, it would have those parts read to the jury, it is the Court's feeling now that to read certain parts of the transcript and not read the entire transcript would be to un-

—1853—

duly emphasize that part which was read, and consequently the Court feels that the jury should take the time to recall the evidence the best it can from having heard the evidence and come to a conclusion in this matter based on hearing not only the evidence which the jury wants reread now, but all of the evidence in the case.

Now, I am very reluctant always to deny a request of the jury, but I think that you will understand that if we get to reading parts of the transcript, perhaps we ought to read the entire transcript because there may be some parts that are read and consequently the parts not read wouldn't be fresh in the minds of the jurors like the parts that are read to the jury.

So with that explanation the Court is going to ask the jury to retire again and to recall this evidence for itself, and I think you can recall it for yourself, but I think the Court has a definite recollection about this evidence and I am sure that you all have definite recollections about the evidence, and I think that if you can thrash it out along with the other evidence that is in the case and come to a verdict as to each one of these counts in the indictment it would be better to do it that way.

Jury's Requests for Additional Instructions

—1854—

So with that explanation the Court would ask the jury to retire again and reconsider the four counts of this indictment on trial here.

(Whereupon, at 3:12 o'clock p.m. the jury retired to resume its deliberations.)

The Court: Let the two notes with their envelopes be made a part of the record as Court's Exhibits.

(Court's Exhibits 23 and 24 marked for identification.)

(4:45 o'clock p.m. in the robing room.)

The Court: We got another request from the jury.

"May the jury see the warrants or the warrant and the complaint entered in evidence for arrest of Leon Aiken and Leon Ellis?"

Mr. Starkey: Fine.

The Court: Now, what is in evidence on that?

Mr. Starkey: Exhibit 33.

The Clerk: The copy of the complaint is Government's Exhibit 24, and the warrant of arrest is Government's Exhibit 33.

The Court: In evidence?

—1855—

The Clerk: That is on Aiken, the warrant of arrest, and the copy of the complaint is on Ellis, Exhibit 24, your Honor.

The Court: What is the position of counsel with reference to this request?

Mr. Somers: I feel, your Honor, that this, too, should be accorded the same treatment. It should be treated in the same manner as your Honor felt about the reading of specific portions of the testimony.

The Court: What is your position?

Mr. Archer: Well, I will go along with Mr. Somers. I concur with him that we should follow the previous ruling on this point.

The Court: What is your position?

Mr. Carluccio: Your Honor, being that it concerns Mr. Somers I think whatever he says on it I will go along with.

The Court: And the government's is what?

Mr. Starkey: The government's position, your Honor, is that the jury is entitled to see the exhibits, that they weren't shown exhibits during the course of the trial for the precise reason that they would be available to them during their deliberations in the jury room. They have been told they are entitled to them and I submit the ex-

hibits should be sent to them.

The Court: The Court is going to comply with the jury's request and I think the record protects your position.

(The following proceedings took place at 4:55.)

The Court: As I understand it, all counsel are here in chambers, and counsel agree that rather than bring the jury back to hand them these documents the documents can be handed to them by the deputy marshal. Is that the understanding of counsel?

Mr. Carluccio: Yes, your Honor.

The Court: And let the jury's message and its enclosure be marked the next Court exhibit.

(Court's Exhibit 25 marked for identification.)

The Court: If it is agreeable to counsel for the government and counsel for the defendants, the documents will be handed to the jury by the marshal, the deputy

marshal with the instruction that the exhibits should be inspected on both sides.

Mr. Somers: Thank you, Judge.

Mr. Carluccio: That is good.

The Court: Mr. Marshal, will you hand these two docu-

—1857—

ments, Government's Exhibits 33 and 34, to the jury, and advise them that they should inspect both sides of the documents?

(The following proceedings took place in open court at 5:40 o'clock p.m. in the presence of the jury.)

The Clerk: Mr. Foreman, has the jury agreed upon a verdict?

The Foreman: We have.

The Clerk: How do you find?

The Foreman: We the jury find the defendant Winston Massiah guilty on count 1.

We the jury find the defendant Winston Massiah guilty on count 2.

We the jury find the defendant Winston Massiah guilty on count 7.

We the jury find the defendant Winston Massiah guilty on count 8.

We the jury find the defendant Mitchell Anfield guilty on count 8.

We the jury find the defendant Icky Thorn guilty on count 8.

We the jury find the defendant Leonard Aiken guilty on count 8.

—1858—

The Clerk: Ladies and gentlemen of the jury, listen to your verdict as it stands recorded. You say you find the

defendant MaMssiah guilty on counts 1, 2, 7 and 8; you say you find the defendant Anfield guilty on count 8; you say you find the defendant Thorn guilty on count 8, you say you find the defendant Aiken guilty on count 8, and so say you all?

(All nodded in the affirmative.)

(The jury was polled.)

The Court: Let the record show that it is the verdict of each and every juror. The Court knows that this is the last time you are going to be serving at this term and I want to express to you on behalf of the judges of the Southern District of New York the appreciation of the Court for the conscientious manner in which you have conducted yourselves as jurors.

The sincerity of purpose which you have demonstrated, and the seriousness of purpose which you have demonstrated in undertaking your duties as jurors is commendable. We know that taking up your time is a burden, too, particularly those of you who live outside of Manhattan.

However, it is always an inspiration for me to work

—1859—

with a jury. I have been working with juries for 25 years and every time I work with a jury, with very few exceptions, I am convinced once again that our way is the right way to handle matters of this kind.

You are excused now without a date with the thanks of the Court.

(Jury excused.)

* * * * *

Motions to Set Verdict Aside
Sentence

Mr. Somers: I now move on behalf of Leonard Royal Aiken to set aside the verdict of the jury on the law and on the evidence and for a new trial.

The Court: That motion is also denied.

• • • • •

—1879—

With reference to the defendant Aiken, the sentence is that you serve 13 years on count 8.

• • • • •

Government's Exhibit 33

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 61Cr.206

UNITED STATES OF AMERICA,

—v.—

JOHN DOE a/k/a LEON, meaning thereby to describe a Negro male of medium complexion, with black hair and a medium build, approx. 40 yrs. old approx. 5'9" tall & weighing approx. 165 lbs.

To any United States Marshal or any other authorized officer.

You are hereby commanded to arrest JOHN DOE a/k/a LEON and bring him forthwith before the United States District Court for the Southern District of New York in the city of New York to answer to an indictment charging him with conspire to sell unlawfully imported cocaine etc. in violation of Ti.21 USC § 173, 174.

HERBERT A. CHARLSON
Clerk

By /s/ ELSIE M. EILER
Deputy Clerk

Dated at New York, N. Y.
on March 3, 1961.

Bail fixed at $.....

RETURN

District of ss

Received the within warrant the 13 day of May 1961 and executed same.

FINBARR J. MURPHY

Office-Supreme Court, U.S.
FILED
JAN 14 1964
JOHN F. DAVIS, CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 199

WINSTON MASSIAH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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II. It is reversible error in a federal criminal trial to permit a government agent to testify over objection to damaging admissions made by the defendant to an informer which the agent overheard through an electronic eavesdropping device, which had been secreted with the consent of the informer under the front seat of his automobile, the scene of the overheard conversation, when the informer is not called to testify by the prosecution 11

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

Opinion Below

The opinion below of the Court of Appeals (R.) is reported at 307 F.2d 62.

Jurisdiction

The judgment of the court of appeals was entered on July 27, 1962. A petition for rehearing was denied on October 23, 1962. The time within which to file a petition for a writ of certiorari was extended by Mr. Justice Harlan

to and including December 3, 1962 and the petition was filed on November 29, 1962. The petition was granted on June 10, 1963. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1), Supreme Court Rule 19-1 (a) and 19-1 (b) and Rule 26, Federal Rules of Criminal Procedure.

Questions Presented

I. Are a defendant's incriminating statements made in the absence of his retained counsel after the formal proceeding has been initiated by his arraignment and indictment admissible over objection, in a federal criminal trial?

II. May a government agent testify, over objection, to damaging admissions made by an accused to an informer which the agent overheard by means of an electronic eavesdropping device, which was secreted with the consent of the informer underneath the front seat of his automobile, when the informer who, surreptitiously elicited the admissions from the accused is not called to testify by the prosecution?

Constitutional Provisions Involved

The Fourth Amendment to the Constitution provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment provides, in pertinent part:

> No person • • • shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law • • • .

The Sixth Amendment provides in pertinent part:

> In all criminal prosecutions, the accused shall • • • have the assistance of counsel for his defense.

Statute Involved

The Federal Rules of Criminal Procedure, Rule 26 provides as follows:

> "In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress, or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the Courts of the United States in the light of reason and experience."

Statement

After a jury trial, petitioner was convicted in the United States District Court for the Southern District of New York of violating the narcotics laws. Petitioner was charged with possession of narcotics on board a United States vessel, in violation of 21 U.S.C. 184 (a), importation of narcotic drugs in violation of 21 U.S.C. 174, dealing in narcotics not in the original stamped package, in viola-

tion of 26 U.S.C. 4704 (a), and conspiracy to commit the several offenses. The conspiracy convictions were reversed and remanded for a new trial, while petitioner's substantive convictions, for which nine year concurrent sentences had been imposed, were affirmed, one judge dissenting. The salient facts are as follows:

Petitioner was arrested on May 6, 1958 and was thereafter arraigned without undue delay. He was indicted on May 28, 1958 and charged with a substantive violation of 21 U.S.C. Section 184 a. On July 20, 1959 he was reindicted upon a superseding indictment charging substantive and conspiracy violation of 21 U.S.C. Section 184 a and conspiracy in violation of 21 U.S.C. Sections 173, 174. On March 3, 1961 a second superseding indictment was returned which named additional co-defendants, and additional counts. This second superseding indictment was made possible in part by the information surreptitiously obtained from petitioner. The former indictment was dismissed and it was upon the latter indictment that petitioner was tried and convicted.

On July 22, 1959, having previously retained counsel, petitioner, along with Colson, a co-defendant, pleaded not guilty and was released on bail. Thereafter, without Massiah's knowledge, Colson decided to co-operate with the government. On November 19, 1959 a customs investigator, Finbarr Murphy, placed an electronic eavesdropping device in Colson's car with Colson's consent and instructed him to invite Massiah to take a ride with him in the car and to engage Massiah in conversation relating to the alleged crimes. Murphy, in another car was able to pick up this conversation. At the trial, he testified to certain damaging admissions, elicited from the petitioner by Colson, that he was able to overhear in this manner. Petitioner's counsel objected, without success, to the admission of Murphy's

testimony. The action against Colson and several others was severed. Colson was not called to testify by the prosecution and did not appear at the trial.

Summary of Argument

The admission of Agent Murphy's testimony over objection was reversible error for two reasons:

I. Incriminating statements elicited from an accused by a special government agent, in the absence of his counsel, after the commencement of the formal criminal proceeding, are inadmissible in a federal criminal trial.

II. A government agent may not testify in a federal criminal trial to damaging admissions made by an accused, which he overheard through an electronic eavesdropping device, when the informer who surreptitiously elicited the admissions from the defendant is not called to testify by the prosecution.

ARGUMENT

I.

Reversible Error Was Committed by the Receipt Into Evidence, Over Objection, of the Petitioner's Incriminating Statements Made in the Absence of Counsel, After the Formal Criminal Proceeding Had Been Commenced, by Arraignment and Indictment.

In *Spano* v. *New York*, 360 U.S. 315 (1959) a state criminal conviction was reversed on the ground that a confession coerced as a matter of law had been admitted into evidence. Four justices expressed the view that the confession was inadmissible and the conviction should be reversed without regard to the element of coercion because the police interrogated the defendant in the absence of counsel *Id.* at 324, 326. The question was left open by the remaining members of the court who speaking through the Chief Justice concluded that the confession violated the Fourteenth Amendment "under traditional principles" *Id.* at 320. Considering that a stricter standard of conduct is imposed by the federal courts upon federal law enforcement officials, see *McNabb* v. *United States*, 318 U.S. 332, 340 (1943); *Marshall* v. *United States*, 360 U.S. 310 (1959); *Gideon* v. *Wainwright*, 372 U.S. 335, 349-52 (1963) (concurring opinion, Harlan, *J.*), than is imposed upon their state counterparts, it is reasonable to assume that federal officers must deal through and not around an attorney retained by a defendant under indictment. *United States* v. *Massiah*, 307 F.2d 62, 72 (2d Cir. 1962) (dissenting opinion, Hays, *J.*); Sec. A.B.A. Canons of Ethics, Canon 9; Drinker, Legal Ethics 202 (1953), and that all statements taken from an indicted accused in the absence of his counsel are inadmissible in a federal criminal trial.

In *White* v. *Maryland*, 373 U.S. 59 (1963) the petitioner, after arrest, was taken before a magistrate for a preliminary hearing, and he pleaded guilty to a charge of murder without having the advice or assistance of counsel. An attorney was later appointed to represent him, and he pleaded not guilty at his formal "arraignment". However, the plea of guilty made at the preliminary hearing was introduced in evidence at his trial, without objection, and he was convicted and sentenced to death. The judgment of conviction was unanimously reversed. It was held that petitioner was denied due process under the Fourteenth Amendment when he was allowed to enter a plea of guilty, in the absence of counsel, before a magistrate. In response to the claims that a preliminary hearing in Maryland is not a critical stage in the criminal proceeding; that it was not necessary for the petitioner to enter a plea of guilty at that time; and that it was not then practical to appoint counsel for petitioner; the court answered that whatever may be the normal function of the "Preliminary hearing" under Maryland law, it was under the facts and circumstances of this case "critical" for the petitioner to make an admission of guilt before the magistrate at a time when he had no counsel, and his constitutional rights were violated thereby.

See also, *Hamilton* v. *Alabama*, 368 U.S. 52 (1962); *Chessman* v. *Teets*, 354 U.S. 156 (1957); *Reece* v. *Georgia*, 350 U.S. 85 (1956); *Chandler* v. *Fretag*, 348 U.S. 3 (1954); *Powell* v. *Alabama*, 287 U.S. 45, 57 (1932) and Rule 44 Federal Rules Crim. Pro. (1946).

The right to counsel must be recognized and enforced not only by the courts when an accused appears without counsel but also by the representatives of the government at least once the criminal action has been formally instituted. As has been aptly observed,

"Depriving a person, formally charged with a crime, of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself, and such deprivation 'after indictment and before trial' may, indeed, be tantamount to the denial of effective representation by counsel at the only stage when legal aid and advice would help him."

Spano v. *New York, supra,* at 325-26 (concurring opinion, Douglas, *J.*).

Since *Spano,* the New York Court of Appeals has adopted a strict rule rendering inadmissible all statements made by an accused after the commencement of the formal criminal proceeding, either by arraignment or indictment, where not made in the presence of his attorney, on the grounds that they are obtained in violation of his constitutional right to counsel by "testimonial compulsion", and because their introduction into evidence violates the defendant's privilege against self-incrimination *People* v. *Davis,* 13 N.Y. 2d 690, —— N.E. 2d ——, 241 N.Y.S. 2d 172 (1963); *People* v. *Rodriquez,* 11 N.Y. 2d 279, 183 N.E. 2d 651, 229 N.Y.S. 2d 353 (1962); *People* v. *Meyer,* 11 N.Y. 2d 162, 182 N.E. 2d 103, 227 N.Y.S. 2d 427 (1962); *People* v. *Waterman,* 9 N.Y. 2d 561, 175 N.E. 2d 445, 216 N.Y.S. 2d 70 (1961); *People* v. *Di Biasi,* 7 N.Y. 2d 544, 166 N.E. 2d 825, 200 N.Y.S. 2d 21 (1960); *People* v. *Swanson,* 18 App. Div. 2d 832, 237 N.Y.S. 2d 400 (2d Dept. 1962); *People* v. *Price,* 18 App. Div. 2d 739, 235 N.Y.S. 2d 390 (3d Dept. 1962); *People* v. *Wallace,* 17 App. Div. 2d 981, 234 N.Y.S. 2d 579 (2d Dept. 1962); *People* v. *Karmel,* 17 App. Div. 2d 659, 230 N.Y.S. 2d 413 (2d Dept. 1962); *People* v. *Robinson,* 16 App. Div. 2d 184, 224 N.Y.S. 2d 705 (4th Dept. 1962).

"The initiation of a criminal action against the accused by the finding of an indictment operates to impose cer-

> tain disabilities upon the People. The People would manifestly not be permitted at the trial to call the defendant to the witness stand to establish their case through his testimony . . . By the same token, they may not circumvent the defendant's privilege against self-incrimination by introducing into evidence inculpatory statements obtained from him (following indictment) at a private examination prior to trial . . . " *People* v. *Waterman, supra* at 566, 175 N.E. 2d at 448, 216 N.Y.S. 2d at 75.

In *People* v. *Robinson, supra,* a case factually similar to the one at bar, the Appellate Division unanimously reversed a judgment of conviction because post arraignment statements made in response to a police informer's indirect and surreptitious interrogations and the fruits obtained as a consequence thereof were received in evidence. The accused after having been arrested and arraigned refused to answer questions put to him by the police. A police informer was placed in a cell adjoining his and two detectives secreted themselves within hearing distance. The informer in conversations with the defendant elicited from him what amounted to a full confession to a killing which occurred during a robbery, including the hiding place of the guns used. Upon the trial the overheard conversations were related in detail by the detectives and the guns were introduced in evidence. This was held to constitute reversible error.

On Lee v. *United States,* 343 U.S. 747 (1951), upon which the government has heretofore relied and which today at best, is doubtful authority, in the Federal Courts. See *Lopez* v. *United States,* 373 U.S. 427, 441-46 (1963) (concurring opinion), does not treat with the right to counsel issue raised herein. In *On Lee* a sharply divided court held that the use in a federal criminal case of testimony as to damaging admissions made by the accused, while on bail

pending indictment, in a conversation on the premises of the accused which the witness, a government agent outside such premises was enabled to overhear by a radio transmitter concealed on the person of an informer, the other party to the conversation, did not violate the constitutional immunity of the defendant from unreasonable searches and seizures; was not within the prohibition of the Federal Wire Tapping Act; and was not inconsistent with the requirements of fair play in federal law enforcement. The right to counsel issue advanced herein was never discussed by the court.

In the case at bar, it is respectfully submitted that the surreptitious interrogation of the petitioner by Colson, a special agent of the government, in the absence of his retained counsel, approximately one year and a half after the formal criminal proceeding had been instituted effectively violated his constitutional right to counsel and constituted "testimonial compulsion" *Spano* v. *New York, supra; White* v. *Maryland, supra; Leyra* v. *Denno,* 347 U.S. 556 (1953). The introduction of the incriminating statements obtained thereby violated his privilege against self-incrimination. *Bram* v. *United States,* 168 U.S. 532, 542 (1897); *Brock* v. *United States,* 223 Fed. 681 (5th Cir. 1955); *Bullock* v. *United States,* 122 Fed. 213, 215 (D.C. Cir. 1941); *People* v. *Rodriquez, supra, People* v. *Waterman, supra.*

Since the admissions were introduced against the petitioner generally on all of the counts of the indictment the judgment of conviction on the substantive counts which were affirmed below should be reversed and a new trial ordered.

II.

It Is Reversible Error in a Federal Criminal Trial to Permit a Government Agent to Testify Over Objection to Damaging Admissions Made by the Defendant to an Informer Which the Agent Overheard Through an Electronic Eavesdropping Device Which Had Been Secreted With the Consent of the Informer Under the Front Seat of His Automobile, the Scene of the Overheard Conversation, When the Informer Is Not Called to Testify by the Prosecution.

It is clear that *On Lee* v. *United States,* 343 U. S. 747 (1951) but for the right to counsel issue would otherwise control the case at bar if one were to entertain the doubtful assumption that *On Lee* was still good law. That it is not, is made apparent by the fact that five Justices currently sitting on the Court, Chief Justice Warren, Justices Black, Douglas, Brennan and Goldberg have expressed the view that *On Lee* was wrongly decided. See *On Lee* v. *United States* at 758 (dissenting opinion, Black, *J.*); *Lopez* v. *United States,* 373 U.S. 427-441-71 (1963) (concurring and dissenting opinions). This case therefore which factually parallels *On Lee* should formally sound its death knell as authority in the Federal Courts.

In *Lopez* at 441-446 (concurring) the Chief Justice expressed the view that a government agent may not testify to a defendant's damaging admissions surreptitiously elicited from him by an informer, which he overheard as a result of electronic eavesdropping, when the informer is not called by the prosecutor to testify. Electronic eavesdropping may not thus be employed to obviate the prosecution's need to put the informer on the stand where he would be subject to the defense's cross examination. At best its product may only be used to corroborate the testimony of a government agent who elicited admissions from an accused.

This is the outer limit that must be established as a rule of evidence in the federal courts, Rule 26, Fed. Rules Crim. Pro., in order to protect the privacy of the individual from the threat posed by the fantastic advances made in the field of electronic eavesdropping, Dash and Knowlton, "The Eavesdroppers", *Lopez* footnotes 14, 15, 16, 17. That these advances pose grave Constitutional questions under the Fourth and Fifth Amendments has been long recognized and as a result thereof these considerations require this court, at the very least to in the exercises of its supervisory authority, over criminal justice in the federal courts, hold that the receipt of Agent Murphy's testimony under the facts and circumstances of this case constituted reversible error.

One further point needs to be mentioned, which is topical throughout our country and was touched upon in footnote 16 of the *Lopez* case, to wit, the advertising, availability and possible use of these highly sensitive eavesdropping machines, see Appendix B, to be used upon "your friends or enemies" with or without their consent.

Science seems to have today outdone the "Snooper", mentioned in footnote 12, *Lopez*. An exact copy of the advertisement, as it appeared in a national magazine describes this, dress shirt, pocket size, fully transistorized tape recorder of conversations as "just plain fun" . . . "ideal for practical business use."

In Orwellian 1984, there were portions of the room where you could hide from the telescreen. In present day 1963 a face to face business conversation can be easily and inexpensively bugged by a "Candid Recorder" in a shirt pocket weighing less than 1 lb., dimensions 2½" x 6¼" x 1⅝".

Surely to quote Judge Benjamin Nathan Cardozo in *Shepard* v. *U. S.*, 290 U.S. 96, 54 Sup. Ct. 22, 78 L.Ed. 196 (1933);

> "We have reached a high water mark beyond which we shall not go".

In the *Shepard* case, *supra,* Judge Cardozo also said:

> "The reverberating clang of those accusatory words will drown out all weaker sounds."

It is submitted that the inculpatory words, as set forth in Appendix A, the conversation between Massiah and Colson, as related by Murphy, did *in fact* drown all weaker sounds. At the trial the sequence of events transpired as follows:

The jury retired at 11:45 P.M. Their first request was for a copy of the indictment, a logical and normal request. Then at 2:50 P.M. as their second request sent the following note:

> "May the jury see that portion of the transcript or hear that portion of it read that covers Massiah's conversation with Colson's car."

On Pages 1841 to 1854 of the record, the subsequent argument on this jury's request is set out verbatim. Their request was denied and they were left to their own recollection.

However, this incident and interlude only emphasized the fact that the eavesdropping testimony played a substantial part in the conviction of Massiah. But for it, the result may well have been different, but the law is definite that it is not our province to prognosticate or more accurately, speculate.

In such a case, a reversal or new trial is in order that the injustice of the illegal evidence is like a poison, that slight that it may be runs, through the system and contaminates the whole.

Conclusion

For the reasons stated above, it is respectfully submitted that the judgment of the Court below be reversed.

Robert J. Carluccio
Counsel for Petitioner

Edmund Allen Rosner
of Counsel

Dated: August 27th 1963

APPENDIX A

Finbarr J. Murphy—for Government—Direct

• • • • • • •

Q. Do you see the defendant Massiah in the courtroom? A. Massiah is the defendant furthest on the left.

Q. Agent Murphy, did there come a time when you saw the defendant Massiah and the defendant Colson together? A. Yes; there did.

Q. When was that, sir? A. That was on November 19th, 1959.

Q. And where did this meeting occur? A. The meeting occurred on West 146th Street, between Seventh and Eighth avenues at approximately 9:30 p.m. in the evening.

Q. And were they on the street? A. No. This meeting took place in a car operated by Jesse Colson in 1958—a 1958 Chrysler Imperial.

Q. Were you able to overhear what was said? A. Yes; I was.

Q. By what means? A. Prior to this meeting, with the agreement of Jesse Colson, I had placed a Schmidt portable transmitter under the front seat of that vehicle. This device enabled me to pick up the conversation as I am sitting (1399) in another car.

Q. Will you tell the jury what you heard Colson and what you heard Massiah say at this time.

> Mr. Carluccio: Your Honor, I seriously object to this evidence and feel that it is illegally and improperly obtained and constitutes a violation of the constitutional rights of my client. It comes under the category of eavesdropping, tape recording, wiretapping. Also I submit that, being that it was placed under the seat, the back seat, as he states, and I believe at the request of the government, with the cooperation of Jesse Colson—
>
> May I ask this question:
>
> Did Jesse Colson cooperate in helping you to place this transmitter behind the seat of the car, Mr. Murphy?

The Witness: Yes; he did.

Mr. Carlucci: —with his cooperation, wherein Jesse Colson was acting as an agent for the government, that this also constitutes entrapment, and this evidence is illegal and inadmissible, and it should not be admitted at any time in this trial.

Mr. Pogoda: I further object that unless this witness can testify he observed the two of them (1400) and only the two of them in the automobile, the conversation cannot be identifiable unless this witness is prepared to swear that he knows the voices of both people and knew the voices of both people at the time the alleged recording or transmitting or transmission was made.

The Court: Are you prepared to have the witness testify that he recognized the voices?

Mr. Starkey: Yes, your Honor. He previously testified that he talked to Massiah on May 6.

By Mr. Starkey:

Q. Did you recognize his voice on this occasion in November?

Mr. Pogoda: If the Court please, the conversation with Massiah was on May 6th of 1958. There was one conversation. And here we have a conversation on November 19, 1959, a year and a half later. I submit that the one conversation is insufficient as the basis for the recognition of a transmitted telephone voice, and I object to any such response to the question asked by Mr. Starkey.

The Court: Is that the only time you heard the voice of Massiah prior to this recording?

The Witness: No.

(1401)

The Court: This really was not a recording, was it?

The Witness: No. It was transmitted through the air.

The Court: It was a transmission?

The Witness: Yes.

The Court: Received simultaneously by you by radio, I guess?

The Witness: I have earphones to pick it up.

A. (Continuing) Subsequent to the arrest of Massiah, I believe I spoke to him in the Federal House of Detention.

Q. Have you spoken to Massiah since then? A. Yes. I have spoken to Massiah in your office, in November of 1960. I spoke to Massiah—I had a conversation with him in the office of Callandra, I believe, when he came up to look at these particular exhibits here.

Q. Do you have any doubt that the voice you heard over the Schmidt device was Massiah's voice? A. No doubt at all, my reasons being that I had been speaking with Jesse Colson.

The Court: Wait just a minute, please.

The question before the Court now is whether or not you recognized this voice, which was coming over, as (1402) the voice of Massiah. We are not interested in what anybody told you about it. We are interested in finding out whether or not you recognized Massiah's voice.

The Witness: Yes. I recognized it.

Q. Could you also view the conversation as it took place? A. I could.

The Court: You were looking at these people at the same time?

The Witness: Oh, yes, sure.

The Court: You were looking—

The Witness: I had them under observation visually and electronically.

The Court: I see. And you could see that there were only two people in the car?

The Witness: There were only two people; the driver and the defendant Massiah.

The Court: And you were familiar with Colson's voice?

The Witness: Oh, yes, quite familiar.

The Court: You had been talking to him daily for weeks, I assume?

The Witness: Months would be more like it.

The Court: Months?

The Witness: Yes.

(1403)

The Court: And did you recognize Massiah in the car physically by seeing him?

The Witness: I recognized him just opening the door, and when he got inside I recognized him also.

The Court: In other words, you recognized him as the defendant, and as the other person in the conversation with Colson?

The Witness: I did, sir.

The Court: What was the date of this conversation?

The Witness: November 19, 1959.

The Court: And this was after Colson's arrest?

The Witness: Yes. Colson was arrested in July, 1959.

Mr. Carluccio: Your Honor, if the Court please, I also wish to make known to the Court one other reason for my objection, and that is the best evidence rule. I feel that if this is a conversation between Colson and Massiah, and Colson was present at the conversation, that Colson should be brought in to testify as to what was said and how it was said.

Mr. Starkey: Your Honor, I object to—

The Court: Wait a minute.

Mr. Carluccio: The reason being twofold: (1404) Colson is available for testimony—

Mr. Starkey: I cannot let this go any further, your Honor. This is gross misrepresentation on the part of the attorney.

The Court: The jury will disregard what counsel on either side will say here as to the availability of Colson. The jury is not informed as to the availability of Colson.

Mr. Carluccio: When we find that he is alive—not that he has passed away—however, that Colson can testify as to what was said, and I make also the analogy with the tape that we had introduced with the rag: it is not a photograph of the tape, so likewise, the best evidence in this instance is the conversation as Colson heard it from Massiah, in addition to which, as your Honor well knows, the reason for this conversation, most probably, was to pump the defendant for admissions, and if they are admissions against my client's interest, it has always been a rule of law that admissions may be explained, the full circumstances around the admissions and how the statements were made.

In this respect I can't cross-examine an inanimate tape recording, because all Mr. Murphy will be stating in his examination by Mr. Starkey will be the (1405) inanimate words of what he heard on this machine, this tape recording.

If Colson is here to testify, we can find out not only what was said, your Honor, but how it was said, the demeanor of the parties, where it was said in a jocular fashion, whether it was said in a serious fashion, and the like. And I feel that if counsel wishes to bring out admissions, they should be brought by the best evidence, Mr. Colson, who was there, not a hearer of an inanimate recording, so that our right of cross-examination is not curtailed.

The Court: That is overruled. The Court is going to admit the language as far as possible as to what Massiah said, not what Colson said. In other words, I don't want you to give what Colson said at all. I just want you to give what you heard, as the words came from Massiah's mouth.

The jury is also instructed that this evidence is binding only on the defendant Massiah. This evidence is not to be construed in any way with reference to the guilt or innocence of the other defendants on trial. This is evidence only as to the defendant Massiah.

All right. You may proceed.

Mr. Starkey: In regard to the application (1406) of the defense just now, I would merely like to state for the record that I have submitted to the Court and defense counsel the government's memorandum of law citing On Lee, in which the Supreme Court ruled on this precise question.

The Court: All right.

By Mr. Starkey:

Q. What was said by Massiah during the course of this conversation? A. Massiah stated—

The Court: Wait just a minute, please.

Delete from what Massiah said anything about anybody else participating except Massiah. Do you follow me?

The Witness: Yes.

The Court: In other words, don't give us anything about anybody but Massiah, since this is only binding on Massiah. Omit from your testimony anything with respect to any other person, including the defendants in this case.

Mr. Pogoda: If the Court please, if there is a typewritten transcript of the conversation, I think the defense should have the opportunity to examine it.

The Court: Yes.

(1407)

Q. Now, will you proceed, Agent Murphy. A. The defendant Massiah stated that during this time he had made a million mistakes and that instead of fighting each other, they should be fighting hard to win this case. He stated that while in Valparaiso, Chile, at the home of Rene Huasaff, he sat down and wrote a letter to New York stating the exact amount of cocaine he was bringing in, the exact amount that Rene Huasaff expected of him. He said this letter was written in the presence of Rene and his wife. He stated that he had the cocaine in his room in a suitcase for approximately 22 days, and that two

days out of New York he noticed the cocaine was evaporating. He got the roll of tape and attempted to make it airtight so that there would be no further evaporation. And he stated that it was this tape that got him in all this trouble.

Q. Do you recall any further conversation? A. Yes. He stated that on arrival he met a longshoreman and that he motioned him through the passageway to show him where the cocaine was sitting, and that while walking through the passage way he saw two big men following him. He states that, "Jesus Christ, they must have been bulls"—the exact words. To that he said, "I told the longshoreman to come back later, it was too hot."

(1408)

He stated that he intended to give the longshoremen all the cocaine at that time.

Q. Do you recall anything about the informer? A. He stated that the informer—it's a bit difficult to get this across. He stated that he knew who the informer was in this case, and that he thought that besides the informer there were other people involved. He stated that, "If they knew so much about my meeting Rene in his truck in Valparaiso;" that the Feds must have been watching him a lot longer than what they had anticipated.

Q. Can you recall the exact words about the informer? Were any names mentioned? A. Yes. The informer was named as Frank Torres.

Q. Was anything else said? What was said, Agent Murphy? Were any other possibilities discussed? A. Yes. The defendant Massiah stated that he was not stealing from the packages as they were coming in in the past, and he could not see how anybody could accuse him of stealing from any of the packages, because it was not in his makeup to steal, and if he did, he would be afraid of revenge on the part of his fellow-conspirators.

Mr. Carluccio: Objection, your Honor, (1409) especially as to the last part.

Mr. Starkey: The government consents to strike out "conspirators".

Mr. Carluccio: "fellow-conspirators"—that whole phrase.

The Court: The motion of counsel to strike is granted, and the jury is instructed to disregard that part of the testimony.

Q. Was May, the chemist, mentioned? A. Yes. The defendant Massiah stated that besides Frank Torres, he had just remembered that the biggest informer of all—the exact words—the biggest stool pigeon of all was a woman he identified as May, a federal stool pigeon, and it could have been May, because he had some dealings with May. And besides the information they probably got together, the Torres information, "and that's how I was fingered."

Q. And you said a chemist was mentioned? A. Yes. Massiah stated that at one time, while in Valparaiso, he remembered Rene introducing him to a chemist by the name—he didn't mention his name—he said a chemist with a gimpy leg, and he thought perhaps it was also the chemist who could have put the finger on him besides Torres.

(1410)

Q. Did he say why he thought this? A. Yes. He stated that during the transaction this man stood right there, and he was present while the transaction was going on in the past. And he had personal knowledge of just what was transpiring.

Q. Was anything said about a misapprehension by Colson? A. Yes. Massiah stated that Rene questioned him as to who was going to get the load.

Massiah stated that Colson was to get the load, that he was going to handle all the distribution of it.

Then Colson—Massiah stated that, "I told Rene it was all for you and that I have no intention of stealing anything."

• • • • • • •

APPENDIX B

DINERS' CLUB MAGAZINE ● SEPTEMBER, 1963

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20553

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

INDICTMENT

C 156-

UNITED STATES OF AMERICA,

—v.—

WINSTON MASSIAH,

Defendant.

The Grand Jury charges:

On or about the 6th day of May, 1958, in the Southern District of New York,

WINSTON MASSIAH, the defendant, unlawfully, wilfully and knowingly did bring on board, had in his possession or control on board a vessel of the United States, while engaged on a foreign voyage, a narcotic drug; to wit, approximately 3 pounds, 8 ounces, and 256 grains of cocaine, not constituting a part of the cargo entered in the manifest or part of the ship stores.

(Title 21, United States Code, Section 184a)

.....

Foreman

PAUL W. WILLIAMS
United States Attorney for the Southern District of New York

20553

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

INDICTMENT

C .....

UNITED STATES OF AMERICA,

—v.—

WINSTON MASSIAH and JESSE COLSON,

Defendants.

The Grand Jury charges:

On or about the 6th day of May, 1958, in the Southern District of New York, WINSTON MASSIAH and JESSE COLSON, defendants, did unlawfully, wilfully and knowingly bring on board, and have in their possession and control on board a vessel of the United States, to wit, the S.S. Santa Maria, while engaged on a foreign voyage, a narcotic drug, to wit, approximately 3 pounds, 8 ounces and 256 grains of cocaine, not constituting a part of the cargo entered in the manifest or part of the ship's stores.

(Title 21, United States Code, Section 184a and Title 18, United States Code, Section 2.)

20553

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

INDICTMENT

No. 61 Cr.

UNITED STATES OF AMERICA,

—v.—

WINSTON MASSIAH, JESSE COLSON, MITCHELL ANFIELD, GRANVILLE SMITH, NOEL MAXWELL, WILLIAM ADAMS, JOHN HENRY PURRY, CLARENCE WHITE, NICK HOLIDAY, ICKY THORN, SYLVIA FERRIS, JOHN DOE, a/k/a "LEON", meaning thereby to describe a Negro male of medium complexion, with black hair and a medium build, approx. 40 yrs. old, approx. 5'9" tall, and weighing approx. 165 lbs.,

Defendants.

The Grand Jury charges:

On or about the 6th day of May, 1958, in the Southern District of New York, WINSTON MASSIAH, JESSE COLSON and MITCHELL ANFIELD, the defendants, did unlawfully, wilfully and knowingly bring on board, and have in their possession and control on board a vessel of the United States, to wit, the S.S. Santa Maria, while engaged on a foreign voyage, a narcotic drug, to wit, approximately 3 pounds, 8 ounces and 256 grains of cocaine, not constituting a part of the cargo entered in the manifest or part of the ship's stores.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 199

WINSTON MASSIAH, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (R. I, 1–19) is reported at 307 F. 2d 62.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1962 (R. I, 20).[1] A petition for rehearing was denied on October 23, 1962 (R. I, 21), and a petition for rehearing *en banc* on October 31, 1962 (R. I, 22). On November 23, 1962, Mr. Justice Harlan extended the time within which to file a petition for a

[1] "R. I." refers to the 24-page record containing the proceedings in the court of appeals and this Court. "R. II." refers to the 110-page transcript of the proceedings in the district court.

writ of certiorari to and including December 3, 1962 (R. I, 23). The petition was filed on November 29, 1962, and granted on June 10, 1963 (R. I, 24). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

After petitioner and some of his co-defendants had been indicted, the government continued its investigation of a narcotics ring in the hope of discovering other members of the ring to which petitioner was believed to belong. By means of a listening device, installed, with his consent, in the automobile of a co-defendant who had turned informer, an officer heard a conversation between petitioner and the co-defendant. The officer testified concerning the conversation at petitioner's trial. The questions presented are:

1. Whether the testimony should have been excluded because the conversation was overheard by an electronic device.

2. Whether testimony as to petitioner's admissions should have been excluded because the conversation occurred after indictment and in the absence of counsel.

STATEMENT

After a jury trial petitioner and several co-defendants were convicted of narcotics offenses in the United States District Court for the Southern District of New York. Petitioner was convicted of possession of narcotics on board a United States vessel (21 U.S.C. 184a); concealing narcotics after illegal importation (21 U.S.C. 173, 174); dealing in narcotics

not in the original stamped package (26 U.S.C. 4701, 4703, 4704(a) and 7237(a)); and conspiracy to commit an offense against the United States with reference to the importation, concealment, and sale of narcotics (R. II, 1–5). He was sentenced to nine years' imprisonment on each of the four counts, the sentences to run concurrently.

On appeal, the United States Court of Appeals for the Second Circuit reversed the conspiracy conviction because of an error in the trial court's instruction (one judge dissenting), but affirmed petitioner's conviction of the substantive offenses (one judge dissenting).

1. In April 1958, information was received by federal customs agents from one Torres, a seaman, that petitioner, who was also a seaman, was bringing into the United States a shipment of cocaine concealed aboard a United States vessel (R. II, 59–60, 92–94). Petitioner had previously told Torres that he knew of the latter's dealings with Colson (from whom Torres had purchased cocaine) and had asked Torres how many "pieces" Torres wanted (R. II, 53–59).[2] As a result of this and other information, agents searched

[2] Petitioner's "girl friend" testified at the trial that in May or June 1956, he had introduced her to Colson, who often came to petitioner's apartment, and that in October of that year petitioner told her that he and Colson were dealing in "coke"—a term which she understood to mean cocaine (R. II, 19–24, 29). On several occasions in 1956, a longshoreman had carried packages ashore for petitioner and was paid for his service. The arrangement ended when petitioner failed one time to pay the longshoreman, explaining that he had no money and that the cocaine had been taken from him (R. II, 30–37).

the ship on May 6, 1958, and found in the "aft peak" five packages subsequently proved to contain about three pounds, eight ounces of cocaine (R. II, 45–49, 66–67, 93–94). The packages were wrapped in a cloth secured by a piece of adhesive tape, which was of the same size, weight, and number of threads per inch as a roll of tape found in petitioner's locker. The jagged end of the piece which had secured the cloth matched the end of petitioner's roll (R. II, 70–78). Petitioner admitted to the agents that he owned the roll of tape, explaining that he had used it on a sprained wrist (R. II, 67–69).

Petitioner was arrested and searched. In his National Maritime Union membership book there was the notation "Renie" and the number 6085 (R. II, 81–82). Telephone records showed that on February 20, 1958, Colson had placed a call to one "Rene Hausaff" in Valparaiso, Chile at number 6085 (R. II, 43–44, 82). On several earlier occasions, Colson had telephoned to Chile in connection with supplies of cocaine (R. II, 44–46), and in February 1958 he had directed another seaman to pick up some narcotics in Valparaiso (R. II, 38–39, 42–43). At the time of petitioner's arrest on board ship, a customs agent observed Colson waiting at the pier (R. II, 92).[1]

2. On May 28, 1958, petitioner was indicted for possession of narcotics aboard a United States vessel (R. II, 106). A second indictment was returned on

[1] Shortly before petitioner's arrival on the ship, while he was still at sea, his "girl friend" received a letter in which petitioner told her to call Colson and advise him that petitioner would bring in some "discos" (R. II, 27–29).

July 20, 1959, charging two conspiracies in addition to the possession offense (R. II, 107–108). In the two conspiracy counts, petitioner, Colson, Hausaff and other unknown persons were alleged to have conspired to possess narcotics on board a United States vessel and to import, conceal and facilitate the sale of narcotics. The instant indictment, which also named a number of other defendants, was returned on March 3, 1961.

3. On July 27, 1959, Colson began to cooperate with the government and had the first of some twenty or thirty conversations with agent Murphy who was in charge of the customs aspect of the investigation (R. II, 94–95).[4] Colson named one "Leon"[5] as "a big connection" and "the biggest buyer" of the smuggled cocaine (Tr. 1517).[6] "Leon's" true identity was not discovered until May 9, 1961, approximately two months after the return of the indictment at bar (Tr. 1472–1476). The identity of defendant Ellis, referred to by Colson only as "Schoolboy," was not discovered until he was arrested in April 1961, approximately a month after this indictment (Tr. 1521–1524).

During the investigation, Murphy, with Colson's permission, placed a Schmidt radio transmitter under

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[4] After he was indicted, Colson told Ellis, an intermediary in various cocaine transactions, that "they was looking for the whole syndicate, everybody was in it, they were looking for them" (Tr. 1021).

[5] Leon was described in a "John Doe" count (R. II, 4).

[6] "Tr." refers to the transcript of the trial which is on file with the Clerk.

the front seat of Colson's automobile, which enabled Murphy to overhear conversations in the car (R. II, 83–84). On November 19, 1959, Murphy overheard a conversation between Colson and petitioner who had entered the vehicle. Later, Murphy overheard (by the same method) a conversation between Colson and Anfield, at a time prior to Anfield's eventual arrest and indictment (R. II, 90–91, 95). At an unspecified time a tape recording was apparently made of another conversation in Colson's car—this one between Colson and Torres, the original informer (Tr. 1178, 1180).

When, at petitioner's trial, the government attempted to introduce Murphy's testimony as to what he had heard over the transmitter on November 19, 1959, petitioner's counsel objected (R. II, 84):

> Your Honor, I seriously object to this evidence and feel that it is illegally and improperly obtained and constitutes a violation of the constitutional rights of my client. It comes under the category of eavesdropping, tape recording, wiretapping.

Counsel also stated that the use of Colson constituted "entrapment." Counsel for defendant Anfield objected on the ground that Murphy had not shown sufficient familiarity with the voices in question (R. II, 84). After it was established that Murphy knew the voices and had observed the parties as they spoke (R. II, 85–86), petitioner's counsel made a further objection, contending that under the "best evidence" rule, Colson should be called to testify concerning the conversation (R. II, 86). Colson had already refused to

testify at a prior trial and, as a result of statements in which he said that he had been threatened and he feared for himself and his family, a mistrial had been declared (see pp. 68–70, 90, of the transcript of the first trial, which is on file with the Clerk of this Court). At the outset of the instant trial, Colson pleaded guilty and said that he was afraid since his wife and children had been threatened with death (both on the street and over the telephone) and he had likewise been threatened (R. II, 16). The court overruled the objections to evidence of petitioner's conversation with Colson. However, it ruled that agent Murphy could not testify to anything Colson had said and that this evidence was only admissible as to the guilt or innocence of petitioner (R. II, 87–88). Similarly, Agent Murphy's testimony concerning statements Anfield made to Colson were later held admissible as to Anfield (R. II, 91).

In his conversation with Colson, petitioner said that he had made a "million" mistakes, but that instead of fighting each other they should be fighting to win the case. He recounted that while in Valparaiso, Chile, he had written a letter to New York in which he stated the amount of cocaine he was bringing in to the United States and that it was to be delivered to Colson. He said that he had carried the cocaine in his suitcase until the ship was about two days out of New York, but that when the cocaine seemed to be evaporating he had attempted to make it airtight with a roll of tape. This, petitioner said, was what had got him into trouble. He went on to recount that, upon arrival, he was motioning a longshoreman through the passageway to show him where the cocaine was located when

he saw two men following him, causing him to send the longshoreman back. He also speculated as to who had informed against him (R. II, 88–90).

Colson's conversations with both petitioner and Anfield had also been tape-recorded over a Minifon device which had been placed in the glove compartment of Colson's car (R. II, 91). After petitioner objected to admitting these tapes on the grounds that they contained statements relating to defendants other than petitioner and contained privileged matters, the district court sustained the objection (R. II, 91–92).

ARGUMENT

INTRODUCTION AND SUMMARY

The issue in this case is whether the district court was obliged to exclude reliable and probative evidence on the ground that it was obtained improperly. The evidence consisted of the testimony of a federal officer as to a conversation he overheard between petitioner and a co-defendant which occurred after their indictment. The conversation occurred in the co-defendant's automobile, and the officer listened by means of a radio transmitter placed there with the co-defendant's permission. The co-defendant was a partner of petitioner in the criminal venture, and there is nothing to indicate that he either coerced petitioner, or induced him by persuasion based on friendship, to discuss his criminal activities.

The use of a transmitter did not violate petitioner's rights under the Fourth Amendment. No trespass

was committed since the transmitter was placed in the automobile with the owner's permission. Therefore, this case does not resemble the situation in which law enforcement officers, either physically or by an electronic device, have entered into a house, office, or automobile without the consent of the owner in order to obtain information. Nor did the government intrude on the privacy of two persons both of whom desired to keep their conversation private. The co-defendant instead of acting as a loyal confederate of petitioner, was in fact acting for the government. This Court has held that the government may use deception to obtain evidence of crime (*Sherman* v. *United States,* 356 U.S. 369, 372); typically, of course, this involves the use of agents or informants. The additional use of a transmitter merely helped to ensure that the evidence obtained by the co-defendant would be reliably remembered and recorded. Surely, if the co-defendant's testimony is admissible, there can be little interest in excluding more reliable evidence of the same conversation because it prevents the suspect from denying what he actually said. *Lopez* v. *United States,* 373 U.S. 427, 439.

Nor was there a violation of the right to counsel or the right to refrain from self-incrimination. The use of the transmitter is completely irrelevant as to each of these rights. The only question is whether the government may deliberately have an informant talk to a defendant after he has been indicted without revealing that he is working for the government. We submit that in the circumstances of this case, where there is no indication that petitioner was co-

ereed or induced by persuasion in the guise of friendship to implicate himself, the government may introduce statements which petitioner freely made.

This case is squarely controlled by this Court's decision in *On Lee* v. *United States,* 343 U.S. 747. There, the Court upheld a conviction where the government introduced testimony of an officer concerning a conversation after complaint and preliminary hearing between an informant and the defendant heard by means of a transmitter. The informant, as in this case, was a confederate of the defendant and consequently deceived him by not revealing his connection with the government. The decision in *On Lee* has been followed by the courts of appeals and has never been limited by this Court.

The only distinctions between this case and *On Lee* make the case at bar considerably stronger for the government. In *On Lee,* since the informant had brought the transmitter into the defendant's store without permission, it was possible to argue that in a sense the informant was a trespasser. Here, the transmitter was located in the co-defendant's own car and a trespass could not possibly have occurred. Moreover, in *On Lee,* the government itself apparently decided not to call the informant; this, as the Chief Justice noted in concurring in *Lopez* v. *United States,* 373 U.S. 427, 443–445, prevented the defendant from showing, by means of cross-examination, that his statements were coerced or induced by friendship. In the instant case, the co-defendant, because of fear induced by threats, had refused to testify when

the government tried to call him as a witness at the first trial. Furthermore, the transcript of the conversation showed the circumstances surrounding it, and its introduction by the government was denied on petitioner's own objection.

I

THE AGENT'S TESTIMONY CONCERNING PETITIONER'S STATEMENT TO THE CO-DEFENDANT IN THE CO-DEFENDANT'S AUTOMOBILE WAS NOT INADMISSIBLE BECAUSE IT WAS HEARD BY A TRANSMITTER PLACED WITHIN THE AUTOMOBILE WITH PERMISSION OF THE CO-DEFENDANT

A. PLACING THE TRANSMITTER IN THE AUTOMOBILE WITH THE CONSENT OF THE OWNER DID NOT VIOLATE THE FOURTH AMENDMENT

It is important to emphasize at the outset what this case does not involve. First, no government agent entered a house, office, or other property of any person without his consent, either to listen personally to private conversations or to place a transmitter or recording device which would allow listening to such conversations. Rather, the officers placed a transmitter and recording device within an automobile with the consent of its owner, who was also a party to the conversation. As a result, this case does not involve any kind of trespass no matter how broadly that term is defined. The situation is no different from that which would have been presented if the agent had hidden in the trunk of the car with Colson's consent and thus overheard the conversations.

Second, there was no electronic eavesdropping or other intrusion upon unsuspecting or unwilling per-

sons without the consent of any of them. The constitutional test up to now has been whether there was a physical trespass (*Goldman* v. *United States*, 316 U.S. 129; *Silverman* v. *United States*, 365 U.S. 505; *On Lee* v. *United States*, 343 U.S. 747; *Lopez* v. *United States*, 373 U.S. 427), but we recognize that electronic devices offer ways of spying out and overhearing that may raise serious constitutional problems concerning the right to privacy which perhaps cannot be solved solely in terms of physical invasions. This case, however, involves no such invasion of privacy as might be claimed if law enforcement agencies used an electronic device to pick up from a distance a conversation in a public place between two persons, both of whom intended to preserve their secrecy inviolate. Nor is the situation like that in *Goldman* v. *United States* where investigators used an electronic device to overhear a conversation in a private room. Here we deal with a situation in which one of the participants agreed to repeat the conversation and allowed it to be recorded and transmitted. Whenever two men converse, each takes the risk that the other may relate the conversation to third parties. The electronic device, used with the consent of one participant, is no greater invasion; it is simply more reliable evidence.

Accordingly, the instant case is well within the controlling precedents and presents no occasion to depart from them. This Court held in the *Goldman*,

Silverman, and *On Lee* decisions that, in the absence of a physical invasion of a protected area, the use of listening devices to obtain information does not violate the Fourth Amendment. This rule has been consistently followed by the courts of appeals. *United States* v. *Finazzo*, 288 F. 2d 175 (C.A. 6), certiorari denied, 368 U.S. 837; *United States* v. *Vittoria*, 284 F. 2d 451 (C.A. 7); *United States* v. *Kabot*, 295 F. 2d 848 (C.A. 2), certiorari denied, 369 U.S. 803; *Anspach* v. *United States*, 305 F. 2d 48 (C.A. 10), certiorari denied, 371 U.S. 826; *Gorin* v. *United States*, 313 F. 2d 641 (C.A. 1), certiorari denied, 374 U.S. 829.

The facts at bar are even stronger than in any of the cases previously decided by this Court since they involve neither trespass nor a significant intrusion upon privacy. In *On Lee*, for example, the conversation between the defendant and his friend (acting as informant) occurred in the defendant's place of business. In *Lopez*, where an agent recorded a conversation between the defendant and himself, the conversation took place in the defendant's private office. In those cases it was argued that there was an intangible form of "trespass" which was committed when the device in effect brought the government surreptitiously into the house or office. Thus, in *On Lee*, Mr. Justice Burton suggested in dissent that the transmitter carried by the informant actually brought the government into the laundry, and that there was in this

sense a "trespass." See 343 U.S. at 766–767. In *Goldman*, Mr. Justice Murphy emphasized in dissent that the detectaphone reached into the privacy of private quarters to hear conversations there even though no physical entry had taken place. 316 U.S. at 139–140. Alternatively, he suggested that "The application of a detectaphone to the walls of a home or a private office constitutes a direct invasion of the privacy of the occupant, and a search of his private quarters." *Id.* at 141.

No such view can be taken of the facts at bar. The government did not, either physically or through an electronic device, enter any place where it had no right to be. The government agent had the right to be physically present or to place the transmitter in the automobile by virtue of the owner's consent. Petitioner, for his part, had no protected interest in Colson's automobile. The government was already present at the conversation since Colson was working with the government. Consequently, petitioner's right to privacy under the Fourth Amendment has not been violated.

B. THE USE OF THE TRANSMITTER WAS A LEGITIMATE LAW ENFORCEMENT PROCEDURE AND THEREFORE THE EVIDENCE SHOULD NOT BE EXCLUDED UNDER THE COURT'S SUPERVISORY POWER

Petitioner contends (Pet. Br. 12) that this Court should hold that the testimony of agent Murphy was inadmissible under its supervisory power. In *Lopez* v. *United States, supra,* 373 U.S. at 440, the Court described this power in a similar case:

> [The supervisory power] must be sparingly exercised. Its application in the present case,

> where there has been no manifestly improper conduct by federal officials, would be wholly unwarranted.
>
> The function of a criminal trial is to seek out and determine the truth or falsity of the charges brought against the defendant. Proper fulfillment of this function requires that, constitutional limitations aside, all relevant, competent evidence be admissible, unless the manner in which it has been obtained—for example, by violating some statute or rule of procedure—compels the formulation of a rule excluding its introduction in a federal court.

Similarly, here, where the government did not violate any constitutional provision, statute, or rule of procedure, there is no reason for exercise of this Court's supervisory power.

1. There is no justification for a general rule barring all evidence obtained by use of electronic devices

This Court refused only last Term in *Lopez* to lay down a general rule that under its supervisory power all evidence obtained by use of electronic devices is inadmissible. 373 U.S. at 440. Accord, *On Lee* v. *United States, supra; Goldman* v. *United States, supra.* There is nothing here to warrant any different result.

A determination as to the propriety of the use of electronic listening devices, regardless of surrounding circumstances, would of necessity depend upon an array of technical information concerning the potentialities of the devices as revealed by experiment and experience. This would require an extensive inves-

tigation. Thus, complex and often conflicting testimony has been developed before a Senate subcommittee which has held protracted hearings on "wiretapping and eavesdropping."[1] This surely is not a case in which to consider or resolve the conflicting views. Indeed, it exemplifies a situation where use of an electronic device was fully justified under all of this Court's precedents. No one took a listening device into petitioner's home, office, or other property; no device was used to overhear a conversation within a building or room from the outside; there was not even intrusion into a conversation which was "private" in the sense that neither party had consented to the use of the device. Rather, the case involves a conversation between petitioner—whose criminal activities were well known to government officers—and a man who agreed to the installation of a device in his own automobile. The transmitter and recorder were intended to obtain reliable evidence concerning a conversation which the informant would describe to the officers. It has been widely recognized that lis-

[1] "Wiretapping, Eavesdropping, and the Bill of Rights," Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 85th Cong., 2d Sess. (1958); "Wiretapping, Eavesdropping, and the Bill of Rights," Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 86th Cong., 1st Sess. (1959); "Wiretapping and Eavesdropping Legislation," Hearings before the Subcommittee on Constitutional Rights of the Committee on the Judiciary, United States Senate, 87th Cong., 1st Sess. (1961).

tening to a conversation with the consent of one party raises a very different question from that presented by the use of electronic equipment without the consent of either party. Cf. *Rathbun* v. *United States*, 355 U.S. 107.[4] Consequently, under proposed federal legislation and administrative rules on the subject, the prohibition against electronic eavesdropping would not apply where one party to the conversation consents to the use of the device.[5]

2. Evidence obtained through an electronic device, without a trespass, to record and transmit conversation with the consent of one of the participants should not be excluded

Since the government agent did not commit a trespass or intrude upon ~~destroy~~ the privacy of persons who jointly intended to keep their conversation private, petitioner's claim that his rights were invaded must turn on the fact that he was deceived by a confederate. The deception was that unknown to peti-

[4] See also Williams, *The Wiretapping-Eavesdropping Problem: A Defense Counsel's View*, 44 Minn. L. Rev. 855, 866 (1960). The author, a frequent critic of the use of electronic equipment, recognizes that there is far less objection to eavesdropping on a conversation where one party has consented.

[5] For the latest administrative proposal, see Federal Communications Commission, "Notice of Proposed Rule Making," Docket No. 15262, adopted January 15, 1964. For proposed federal legislation, see: H.R. 13842, 85th Cong., 2d Sess. (1958); S. 1292, 86th Cong., 1st Sess. (1959); S. 1221, 87th Cong., 1st Sess. (1961). The proposed bills, all introduced by Senator Keating, appear to be based on a New York statute which exempts eavesdropping by "consent." New York Penal Law, Sections 738, 813-a.

tioner, Colson was a government informant. Surely, however, no protected right is violated because the government uses informants. This practice has been recognized by this Court not only in *On Lee* but in numerous other cases. *E.g., Sherman* v. *United States,* 356 U.S. 369; *Sorrells* v. *United States,* 287 U.S. 435. The lower federal courts have upheld convictions in hundreds of such cases. Indeed, even in *Lopez,* the defendant was deceived because he didn't know that the government agent was cooperating with his supervisor. Whether the persons used are regular government agents or temporary informants, are friends of the suspect or strangers, the defendants are deceived when they do not suspect that the persons to whom they are talking are working for the government.

The ability to obtain proof by such strategems is of enormous importance to law enforcement. In narcotics and other fields, criminals have taken elaborate precautions to prevent detection, particularly of their leaders. Often the sole method of obtaining evidence admissible in court and sufficient to support a conviction is through the use of informants who deceive criminals into believing that they are fellow lawbreakers. This Court has recognized repeatedly that these techniques are essential to law enforcement. In *Sherman, supra,* in discussing the use of informants, the Court said that "Criminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer." 356 U.S. at 372; accord, *Grimm* v. *United States,* 156. U.S. 604, 610; *Sorrells* v. *United States, supra,* 287 U.S. at 441.

The sole difference between this case and the usual case involving informants is that here a device re-

corded the conversation and a transmitter broadcast it to a nearby agent. However, this did not invade any right of petitioner to privacy. As we have seen, he was talking in someone else's automobile. The only meaningful interest which petitioner can assert is his interest in keeping his conversation private. But, as already observed, Colson could legitimately report the conversation to law enforcement officials or to anyone else. Thus, the transmitter and recording device added nothing except the assurance that the conversation would be reported and recorded accurately.

We have urged that the transmission and recording of conversations between informants and suspects is desirable from the standpoint of effective law enforcement. In contrast, suspects have no significant countervailing interest in preventing such procedures. If the conversation is innocent or the suspect is entrapped, the transmission and recording protect the suspect from erroneous or perjurious testimony. If the conversation is incriminatory, the informant can himself report the conversation to officers and testify at the trial whether or not the conversation is transmitted to agents or recorded. To be sure, if the informant's testimony is not convincingly corroborated, it may be less damaging to the defendant. But this is hardly a line of argument which can aid petitioner: the law of evidence is certainly not designed to exclude the more reliable forms of proof. As this Court stated only last Term in *Lopez*, "[s]tripped to its essentials, petitioner's argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's [here the co-defendant's] memory, or to chal-

lenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment. For no other argument can justify excluding an accurate version of a conversation that the agent could testify to from memory." 373 U.S. at 439. See *Todisco* v. *United States*, 298 F. 2d 208, 210(C.A. 9), certiorari denied, 368 U.S. 989; *Carnes* v. *United States*, 295 F. 2d 598, 602 (C.A. 5), certiorari denied, 369 U.S. 861. The primary purpose of a criminal trial must be the ascertainment of truth. Surely, then, evidence which is constitutionally obtained cannot be inadmissible merely because it is so reliable that it prevents perjury.

C. ANY PREJUDICE RESULTING FROM THE SUBSTITUTION OF THE AGENT'S TESTIMONY FOR THE RECORDING ITSELF RESULTED FROM RULINGS REQUESTED BY PETITIONER

As we have seen, there can be little doubt that an informant can testify as to a conversation he has had with a suspect. We submit that the recording of conversations between informants and suspects, where no trespass has occurred, is a completely legitimate law enforcement procedure. It results in obtaining reliable and probative evidence of inestimable use in the proof of criminal conduct. No less important than its utility in helping law enforcement is the fact that it safeguards defendants from distorted testimony and aids the administration of justice. Informants, in the tension of the situation and in their enthusiasm to help the law enforcement officers to whom they report, may, entirely without malice, interpret conversations in a way which is unfair to the suspect. Similarly, informants may overstep their instructions and entrap a suspect. Even slight

nuances in describing a conversation may be of crucial importance in determining guilt or innocence or an issue of entrapment. Surely, it is preferable that these crucial facts be established by a recording of the conversation itself.[10] And if agents may properly make a recording, there is no reason why it should be inadmissible. For probative and reliable evidence is admissible unless obtained illegally.

The recording of the conversation in this case (which we have filed with the Clerk) would have given assurance that the agent had correctly testified that petitioner had actually admitted his guilt to Colson, and that he was neither coerced nor improperly induced to make the admissions. When the government sought to introduce the recording at petitioner's trial, petitioner objected on the ground that the recording contained evidence against defendants other than the petitioner and privileged matters (R. II, 91). The district court sustained the objection (R. II, 92). We believe that this determination erred on the side of the defendants. Since the government had proved a conspiracy and there is no indication that the conspiracy had ended at the time this conversation occurred, the evidence was admissible against all the defendants. Moreover, the court could have deleted those parts of the recording relating to other defendants or to privileged matters, or given instructionsto the jury as to the use of the evidence.

[10] While a recording can be tampered with, the defendant has the right to cross-examine the agent testifying to its authenticity. The fact that it is conceivable that an agent may perjure himself no more makes a recording inherently unreliable and inadmissible than any other evidence which likewise may be fabricated.

In any event, the recording was excluded on petitioner's objection. Consequently, he is in no position to claim that he was prejudiced by the government's use of less reliable evidence—the testimony of the government agent who overheard the conversation by use of a transmitter. Moreover, this testimony was also inherently more reliable than the testimony of the informant himself (which would clearly have been admissible), if only because the trained agent has the opportunity to concentrate his attention on what he is hearing by means of the transmitter.[11]

D. UNDER THE CIRCUMSTANCES OF THE PRESENT CASE, THE EVIDENCE OBTAINED BY MEANS OF THE TRANSMITTER WAS NOT RENDERED INADMISSIBLE BY THE ABSENCE OF TESTIMONY FROM THE CO-DEFENDANT

In his concurring opinion in *Lopez* v. *United States*, 373 U.S. 427, 441–446, Chief Justice Warren suggested that, in determining whether an agent may testify concerning an incriminating conversation which he has overheard by the use of an electronic device, the presence at the trial of the other party to the conversation may be a significant factor. The Chief Justice suggested that the testimony of the informant may

[11] We believe that the district court also erred on the side of the defendant in not allowing the agent to testify as to the entire conversation. The court, on petitioner's objection, did not allow the agent to describe what Colson had said, apparently on the basis of the best evidence rule (R. II, 87). However, the government had tried to call Colson as a witness at petitioner's first trial, but he had refused to testify and ultimately claimed the Fifth Amendment because of threats made against his family and friends. Moreover, the best evidence rule does not bar witnesses from testifying to conversations they have heard. And, in any event, the government did offer the best evidence, a recording of the conversation.

show the nature of the informant's friendship with the suspect, "the possibility of other unmonitored conversations and appeals to friendship, the possibility of entrapments, police pressure" to persuade the friend to become an informant, and the informant's own recollection of the events. 373 U.S. at 444.

We submit that the admissibility of testimony by the agent should be determined in the same way as other evidence. We would agree that, if the evidence for some reason should appear inherently unreliable, the government would have the burden of showing sufficient reliability to warrant submission to the jury. Consequently, we assume that in some situations the government might be required to introduce the testimony of the informant to a conversation in which he participated. On the other hand, if evidence is reliable and probative, it should be admitted. Once a reasonable measure of reliability is shown, the government need not negate all possible doubts as to reliability nor present cumulative evidence on the same subject. Instead, the defendant has the responsibility of challenging the witness' credibility if he so desires.

Normally, the testimony of a government agent is reliable; indeed, it is likely to be more reliable than that of the informant. He is not subject to the tensions of the informant engaged face-to-face with the suspect; he is concentrating on hearing and remembering what is said; he is trained to remember evidence for purposes of trial; and he is presumably devoted to the honest performance of his duty. The evidence of the conversation can be made even more reliable by admission of a recording—the procedure

which the government attempted to follow in this case. The recording here in fact demonstrates that the agent's testimony was reliable.

Since the agent's testimony was, by all ordinary standards, competent and reliable, the government was not required to present proof negating the possibility that the evidence was illegally obtained. Rather, the burden is on the defendant to make at least a *prima facie* showing to support such a claim. Defendant made no such proffer here. Furthermore, the agent's testimony and the recording show that petitioner was not induced by friendship or entrapped into an admission—even assuming that such inducement or "entrapment" is important with regard to an incriminating statement as opposed to the commission of a crime. Nor do we believe it necessary to inquire whether the government acted properly in persuading Colson to become an informer; its approach to Colson could not violate any rights of petitioner. Cf. *Jones* v. *United States*, 362 U.S. 257; *Wong Sun* v. *United States*, 371 U.S. 471, 492.

In addition, we submit that, under any reasonable approach, the courts would be bound to consider the reason that the informant did not testify. In this case, this was in no way the fault of the government. When the case first came to trial (only two days before the trial resulting in the conviction at bar), Colson was called by the government as its second witness. He said before even being sworn: "I can't testify in this matter. My family has been threatened" (Transcript of the first trial, p. 64). The prosecution confirmed to the district court that such threats had been made (Transcript, p. 42). After

taking the stand, Colson again several times voiced the same fears (Transcript, pp. 68–70):

> Gee, I can't go on with this. My kids, and my wife and my very life are at stake.
>
> • • • • •
>
> • • • You don't understand. My wife is sitting on pins and needles right now with my kids right this minute. I can't live like that forever.
>
> • • • • •
>
> I didn't mean to insult you, Judge. I am sorry, but I am afraid in this thing. My wife has been threatened.

After pleading the Fifth Amendment, Colson was excused without giving any testimony of substance (Transcript, p. 69). As a result of Colson's outbursts, and on the motion of defense counsel, Judge Wright declared a mistrial (Transcript, p. 90). At the outset of the instant prosecution, Colson pleaded guilty and reiterated his fears (R. II, 16). He stated that his wife and children had been approached on the street; that his wife had been called on the telephone; and that he had been approached on the streets by two unknown New York policemen. In each of these instances, he and his family had been threatened with death, and as a result, he had decided not to testify (R. II, 16).

Obviously, then, the government was fully prepared to, and in fact initially did, call Colson to the stand. His ultimate failure to testify was due not to any bad faith or choice of trial tactics on the part of the government, but rather to the effectiveness of threats

against him. Cf. Brief for the United States in *Rugendorf* v. *United States*, No. 223, this Term, pp. 36–37. Until Colson pleaded guilty, the government could not possibly have compelled him to testify. Whether it could do so after his plea, as against a claim that his testimony would incriminate him as to some offense not covered by the charges to which he had pleaded, would in itself have presented a difficult problem. Under these circumstances, the government properly decided to rest on the testimony of the officer who had heard the conversation. To hold that a federal officer could not testify to petitioner's admissions, which the agent had overheard, because Colson had been paralyzed by fear would be to place a premium on intimidation. If Colson's absence as a witness were to be decisive, then any case involving electronic devices would itself invite coercion of witnesses.

II

THE AGENT'S TESTIMONY CONCERNING PETITIONER'S STATEMENTS TO THE CO-DEFENDANT IS NOT INADMISSIBLE BECAUSE THE CONVERSATION OCCURRED AFTER INDICTMENT SINCE THE STATEMENTS WERE FREELY MADE

At the time Colson talked with petitioner in his automobile, both petitioner and Colson were under indictment, and Colson was acting as a government informant. The government was continuing its investigation in order to uncover not only petitioner's source of narcotics but also the intended buyer of the substantial amount he was carrying. The quantity involved was such as to suggest that the ramifications were even greater—that petitioner was part of a large

and well organized ring."[12] It was that ring which the government was out to uncover when it used Colson as an informant. This effort bore fruit since, as the court below stated, it resulted in bringing "broader charges against many defendants" (R. I, 5–6).

The government had the duty of continuing its investigation of the narcotics ring even though petitioner had been indicted. The arrest of petitioner was no guarantee that the ring of which he was a part would cease operation or even that petitioner himself would not participate in some of its activities. It is not unknown for defendants who are out on bail to continue operations, particularly trafficking in narcotics. See, *e.g., Rogers* v. *United States,* 325 F. 2d 485 (C.A. 10), pending on petition for a writ of certiorari, No. 1011 Misc., this Term. In fact, in the very case at bar there was evidence that in May 1961, well after indictment, defendant Aiken brazenly attempted to persuade agent Murphy to go into the narcotics business with him (Tr. 1431–1435). The government was therefore justified in making use of Colson's cooperation by having Colson continue his normal associations and by surveilling them.

Agent Murphy's testimony indicates that Colson did not coerce petitioner into making any incriminating statements or even induce him by appeals to talk in the guise of friendship. The recording of the entire conversation confirms this. Petitioner talked freely to Colson concerning their joint narcotics activities.

[12] The district judge, in passing sentence, commented that he was "shocked by the amount of narcotics which has been disclosed by the evidence in this case" (Tr. 1877).

Petitioner obviously did so because he believed that Colson was still his confederate and that they were facing criminal prosecution together. We submit that the government may properly give a defendant the opportunity to make incriminating statements, where the only deception is that he believes his remarks are private. When the defendant makes the incriminating statements freely, *i.e.*, without coercion or improper inducement, there is no reason why such relevant evidence should be excluded at trial.

A. PETITIONER'S RIGHT TO COUNSEL WAS NOT VIOLATED

1. The decisions of this Court establish that the basic reason why government agents are not permitted, in some circumstances, to question suspects in the absence of counsel is because of the inherent potentialities of coercion. Rule 5(a) of the Federal Rules of Criminal Procedure requires that arrested persons be arraigned without unnecessary delay. The purpose of this rule is to prevent "resort to these reprehensible practices known as the 'third degree' which, though universally rejected as indefensible, still find their way into use." *McNabb* v. *United States*, 318 U.S. 332, 343–344; accord, *Mallory* v. *United States*, 354 U.S. 449, 452–453, 456. But the Court went on to say in *McNabb* that "[t]he mere fact that a confession was made while in the custody of the police does not render it inadmissible." *Id.* at 346. See also, *e.g.*, *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149, 157; *Wan* v. *United States*, 266 U.S. 1, 14; *Hopt* v. *Utah*, 110 U.S. 574, 584–585; *Sparf* v. *United States*, 156 U.S. 51, 55; *Wilson* v. *United States*, 162 U.S. 613, 623,

Thus, the Court has determined, under its rule-making power, that because lengthy interrogation by police officers before arraignment is apt to be coercive, confessions obtained during such a period of interrogation should not be admitted in evidence.

This Court has held, in state criminal cases, that confessions obtained by government agents or attorneys are inadmissible only when they are shown to be coerced and therefore not voluntary. *Spano* v. *New York*, 360 U.S. 315; *Culombe* v. *Connecticut*, 367 U.S. 568. On the other hand, the Court has held that state officials may question a suspect after arrest, in the absence of counsel, for the purpose of obtaining a confession as to pending charges when no coercion is shown. *Crooker* v. *California*, 357 U.S. 433; *Cicenia* v. *Lagay*, 357 U.S. 504. While the Court has stated that the rule would be different (under the supervisory power) as to a federal prosecution where the suspect has been denied his request to confer with counsel (*Cicenia* v. *Lagay*, 357 U.S. at 508-509), this is plainly because of the potentially coercive effect of such questioning. Thus, the Justices who would have gone beyond the majority in the state cases noted above reasoned that a confession obtained in the absence of counsel was inadmissible without a showing of actual coercion because secret interrogation so frequently involves coercion. As Mr. Justice Douglas stated in his concurrence in *Culombe*, "The flow of cases coming here shows that detention *incommunicado* is often accompanied by illegality and brutality. The arrival of an attorney is a specific against these proscribed practices." 367 U.S. at 640. Similarly, in

Crooker, Mr. Justice Douglas stated that the right to counsel may "be necessary as a restraint on the coercive power of the police." 357 U.S. at 443. And Justices Douglas and Stewart referred to the interrogation in *Spano* as a "kangaroo court" (360 U.S. at 325) and "midnight inquisition" (*id.* at 327).

Whatever the problems incident to interrogation by the police, that kind of interrogation is not involved here. This case does not involve either coercion or the potentiality of coercion. Petitioner's conversation with Colson had none of the attributes of a "kangaroo court," "midnight inquisition," or "detention *incommunicado*." The conversation took place in an automobile on a New York street. Petitioner was not questioned by anyone who even appeared to be a government agent; rather, his "interrogator" was his own partner in crime, to whom he talked freely. Petitioner was, of course, under no police control or restraint at the time and was free to come and go as he pleased. As the court below said, "It is not disputed that Massiah entered the car of his own free choice and that he was equally free to speak about the case or to say nothing" (R. I, 7).

We do not dispute the proposition that any threatened impairment of the right to counsel would assume particular importance after the start of a criminal prosecution and that the Sixth Amendment requires solicitous protection of that right. We submit, however, that providing a defendant an opportunity to talk does not constitute an infringement of his right to have the assistance of a lawyer in his defense of the charges against him. Indeed, numerous courts have

held that confessions obtained by police officers from suspects after arraignment or indictment are admissible despite the potentiality of coercion. *United States* v. *Carignan*, 342 U.S. 36; *United States* v. *Bellamy*, C.A. 4, decided January 9, 1964 (defendant, as here, free on bail); *Goldsmith* v. *United States*, 277 F. 2d 335, 340 (C.A. D.C.), certiorari denied *sub nom. Carter* v. *United States*, 364 U.S. 863; *United States* v. *Moore*, 290 F. 2d 436, 439 (C.A. 2), certiorari denied, 368 U.S. 858; *Davis* v. *North Carolina*, 196 F. Supp. 488 (D. N.C.), reversed on other grounds, 310 F. 2d 904 (C.A. 4); *State* v. *Murphy*, 87 N.J.L. 515, 94 Atl. 640. *People* v. *Garner*, 18 Cal. Rep. 40, 367 P. 2d 680, certiorari denied, 370 U.S. 929; *State* v. *Kristich*, 226 Ore. 240, 359 P. 2d 1106.

The thrust of the Sixth Amendment is that the provision of counsel is essential to the conduct of a fair trial. *Gideon* v. *Wainwright*, 372 U.S. 335. The admissibility of extra-judicial admissions made by a suspect or an accused turns, as the many precedents indicate, on quite discrete considerations—fundamentally, whether the will of the accused was overborne. In the instant case, as we have shown, there was no semblance of coercion.[13]

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[13] Petitioner notes (Pet. Br. 8–9) that the New York courts have held that either a defendant's right to counsel or privilege against self-incrimination is violated if he is questioned after indictment or arraignment outside the presence of his attorney. However, all the cases cited, except *People* v. *Robinson*, 16 App. Div. 2d 184, 224 N.Y.S. 2d 705, involved interrogation by law enforcement officials when the defendant was in custody. Thus, it can be said that the interrogation was inherently coercive. But see the cases of this Court cited above at p. 29. Moreover, all other jurisdictions have held that in the absence of some showing of

II. PETITIONER'S PRIVILEGE AGAINST SELF INCRIMINATION WAS NOT VIOLATED

We have seen that petitioner was not denied the right to counsel since he was in no way coerced into conversing with Colson. For the same reason, his privilege against self-incrimination was not violated. The Fifth Amendment expressly provides that no person "shall be compelled * * * to be a witness against himself." See *Bram* v. *United States*, 168 U.S. 532. Here, petitioner talked freely to a confederate. Petitioner had no constitutional right to have the confederate remain loyal to him.

In *Stroud* v. *United States*, 251 U.S. 15, incriminating letters written by an accused while in jail were handed over to prison authorities, who in turn gave them to the prosecutor. The defendant argued that he had been tricked because he believed that the letters were handed over for the sole purpose of placing them in the mail. Brief for Plaintiff in Error, No. 276, Oct. Term 1919, pp. 170-171. This Court held that "there was neither testimony required of the accused, nor unreasonable search and seizure * * *." 251 U.S. at 21-22. The lower courts have likewise ruled that the admission of statements obtained through a jail-cell "plant" are admissible. *Young* v. *United States*, 107 F. 2d 490 (C.A. 5); *Application of Graham*, 132 F. Supp. 69 (S.D. Cal.). Those cases are more difficult than the one at bar since the government had custody of the defendant and controlled his move-

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actual coercion, a confession obtained by police interrogation, without the presence of counsel, after the prosecution has started, is admissible. The *Robinson* case involved a jail-cell "plant," which, as we have noted, is also a more difficult case than the one before the Court.

ments. Here, petitioner freely decided to enter Colson's automobile and talk to him. Moreover, numerous courts have held either expressly (see *Bellamy* v. *United States*, C.A. 4, decided January 9, 1964) or *sub silentio* (see the cases cited above, pp. 31-32) that statements made to law enforcement officers after the start of a criminal prosecution do not violate the Fifth Amendment without any showing of actual coercion. *A fortiori*, the Fifth Amendment is not violated when the suspect does not even know that he is talking to a government agent so that even the potentiality of coercion does not exist.

When a defendant is free on bail, he is no more coerced into incriminating himself when he talks to a government informant than is the suspect in an identical situation who has not yet been indicted. Consequently, petitioner's contention amounts to a claim that the government cannot use informants at all. If agents of the government are required to inform suspects of their privilege not to talk, informants obviously cannot talk to suspects and it should make no difference whether or not an indictment has been returned. Here, just as during an investigation prior to indictment, the government agents were seeking evidence not only as to the suspect but also as to confederates in his criminal activity. Thus, the numerous cases (see p. 18) establishing that the government can use informants to obtain evidence from suspects are directly inconsistent with any claim that the Fifth Amendment bars the admission of this evidence here. Furthermore, the claim is inconsistent with numerous decisions holding that law enforcement agents may question suspects without informing

the suspects of the privilege against self-incrimination. *E.g., United States* v. *Block*, 88 F. 2d 618, 620–621 (C.A. 2), certiorari denied, 301 U.S. 690; *Himmelfarb* v. *United States*, 175 F. 2d 924, 938, note 6 (C.A. 9), certiorari denied, 338 U.S. 860, and the cases therein cited. In the case at bar, the conversation between petitioner and Colson was not affected by even that degree of constraint which may result from a suspect's knowledge that he is talking to a law enforcement officer.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

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